No. 22O142	
Title:	**Florida, Plaintiff** **v.** **Georgia**
Docketed:	October 4, 2013
Lower Ct:	
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 30 2013	Documents filed with the Special Master may be found on the Special Master's website at www.pierceatwood.com/floridavgeorgia142original
Oct 01 2013	Motion for leave to file a bill of complaint filed. (Response due December 2, 2013)
Oct 31 2013	Order extending time to file response to the bill of complaint to and including January 31, 2014.
Jan 31 2014	Opposition to motion for leave to file a complaint of respondent Georgia filed.
Feb 10 2014	Reply in support of its motion for leave to file a complaint of Florida, Plaintiff filed.
Feb 12 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 03 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Sep 18 2014	Brief amicus curiae of United States filed.
Oct 08 2014	DISTRIBUTED for Conference of October 31, 2014.
Oct 08 2014	Supplemental brief of petitioner Florida, Plaintiff filed. (Distributed)
Oct 09 2014	Supplemental brief of respondent Georgia filed. (Distributed)
Oct 10 2014	Supplemental brief of petitioner Florida, Plaintiff filed. (Distributed)

Nov 03 2014	Motion for leave to file a bill of complaint GRANTED. Defendant is allowed 30 days within which to file an answer.
Nov 19 2014	It is ordered that Ralph I. Lancaster, Esquire, of Portland, Maine, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Nov 24 2014	Oath of Special Master filed.
Nov 25 2014	Order extending time to file an answer granted to and including February 2, 2015.
Feb 12 2015	Answer of Georgia filed with Special Master January 8, 2015, received by the Court February 12, 2015.
Apr 14 2015	First interim Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.
Apr 28 2015	DISTRIBUTED for Conference of May 14, 2015.
May 18 2015	Motion of the Special Master for Allowance of Fees and Disbursements GRANTED The motion of the Special Master for allowance of fees and disbursements is granted, and the Special Master is awarded a total of $47,635.01 for the period November 19, 2014, through March 31, 2015, to be paid equally by the parties.
Sep 10 2015	Second Interim Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.
Sep 23 2015	DISTRIBUTED for Conference of October 9, 2015.
Oct 13 2015	Motion of the Special Master for Allowance of Fees and Disbursements GRANTED The motion of the Special Master for allowance of fees and disbursements is granted, and the Special Master is awarded a total of $70, 245.52 for the period April 1, 2015, through August 31, 2015, to be paid equally by the parties.
Feb 10 2016	Third Interim Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.

Feb 24 2016	DISTRIBUTED for Conference of March 18, 2016.
Mar 21 2016	The motion of the Special Master for allowance of fees and disbursements is granted, and the Special Master is awarded a total of $41,564.31 for the period September 1, 2015, through January 31, 2016, to be paid equally by the parties.
Sep 13 2016	Fourth Interim Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.
Oct 17 2016	The motion of the Special Master for allowance of fees and disbursements is granted, and the Special Master is awarded a total of $57,333, for the period February 1, 2016, through August 31, 2016, to be paid equally by the parties.
Jan 11 2017	Fifth Interim Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.
Jan 25 2017	DISTRIBUTED for Conference of February 17, 2017.
Feb 16 2017	Report of the Special Master received.
Feb 21 2017	The motion of the Special Master for allowance of fees and disbursements is granted, and the Special Master is awarded a total of $213,547.35 for the period September 1, 2016, through December 31, 2016, to be paid equally by the parties.
Mar 01 2017	Special Master Report DISTRIBUTED for Conference of March 17, 2017.
Mar 01 2017	Final Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master.
Mar 15 2017	DISTRIBUTED for Conference of March 31, 2017.
Mar 20 2017	The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Sur-replies, if any, with supporting briefs, may be filed within 30 days.
Apr 03 2017	Motion of the Special Master for Allowance of Fees and Disbursements filed by Special Master. GRANTED, and the Special Master is awarded a total of $50,933.89, for the period January 1, 2017, through February 28, 2017, to be paid equally by the parties.
Apr 07 2017	Florida's April 6, 2017, request for an extension of time has been granted as follows: Exceptions to the Special Masters Report are due on or before May 31, 2017; Replies are due on or before July 31, 2017; Sur-replies are due on or before August 30, 2017.

May 31 2017	Exceptions to Report of the Special Master and Brief in Support of Exceptions filed by Florida
Jul 31 2017	Reply of Georgia to Florida's exceptions to the report of the Special Master filed.
Aug 07 2017	Brief amicus curiae of United States in support of overruling Florida's exception 2C to the Report of the Special Master filed.
Aug 07 2017	Brief amicus curiae of State of Colorado filed.
Aug 07 2017	Brief amici curiae of Atlanta Regional Commission Dekalb County, et al., filed.
Aug 30 2017	Florida's Sur-Reply in Support of Exceptions to Report of the Special Master filed.
Oct 10 2017	The Exceptions to the Special Master Report are set for oral argument in due course.
Oct 18 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 06 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 17 2017	SET FOR ARGUMENT ON Monday, January 8, 2018
Jan 08 2018	Argued. For plaintiff: Gregory G. Garre, Washington, D. C. For defendant: Craig S. Primis, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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Party name: Atlanta Regional Commission Dekalb County, et al.,		

RECORD AND BRIEFS

No. 141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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January 2013

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No. _____, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Texas hereby respectfully moves the Court for leave to file the Complaint submitted herewith. [1]

[1] The Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint have been authorized by the Rio Grande Compact Commissioner for the State of Texas, the Texas Commission on Environmental Quality, and the Attorney General of Texas.

In support of its Motion, the State of Texas asserts that its claims as set forth in the Complaint arise from an interstate water compact, its claims are serious and dignified, and there is no alternative forum in which adequate and complete relief may be obtained. For the reasons more fully set forth in the accompanying Complaint and Brief in Support of Motion for Leave to File Complaint, the State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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Counsel for Plaintiff
State of Texas

---

* *Counsel of Record*

No. _____, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

COMPLAINT

The State of Texas brings this action against the Defendants the State of New Mexico and the State of Colorado, and for its cause of action asserts as follows:

1. The Court has original and exclusive jurisdiction of this suit under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

2. The Rio Grande is an interstate and international river that originates in Colorado, flows

in a southerly direction into and through New Mexico and into Texas, and then to the Gulf of Mexico. The Rio Grande, after crossing the New Mexico–Texas state line, forms the international boundary between the United States of America (the "United States") and the United States of Mexico ("Mexico").

3. As a matter of interstate comity, and in order to resolve the existing and future controversies among them, and to equitably divide and apportion the water of the Rio Grande among them, the States of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938. The Rio Grande Compact was ratified thereafter by the respective state Legislatures, and was consented to and approved by the United States pursuant to an Act of Congress. Act of May 31, 1939, ch. 155, 53 Stat. 785. The Rio Grande Compact is reprinted in the Appendix to this Complaint.

4. As detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project. The Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, a storage feature of the Rio Grande Reclamation Project. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual

arrangements. In order for water to be delivered to Rio Grande Project beneficiaries in southern New Mexico and in Texas, it must be released from Rio Grande Project facilities, and allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas. New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico. New Mexico's actions, in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas, violates the purpose and intent of the Rio Grande Compact, causing grave and irreparable injury to Texas.

5. The State of Colorado is named as a Defendant to this Complaint on the basis that it is a signatory to the Rio Grande Compact.

6. In 1904, an Irrigation Congress was held in El Paso, Texas, for the purpose of addressing and resolving a dispute between interests in New Mexico and interests in Texas over the waters of the Rio Grande ("1904 Irrigation Congress"). The 1904 Irrigation Congress resulted in a recommendation for the construction by the United States of a federal dam and reservoir near Engle, New Mexico (which became Elephant Butte Dam and Reservoir), to be operated as a federal reclamation project, pursuant to the Reclamation Act of 1902, by the United States Bureau of Reclamation ("Bureau of Reclamation"). The 1904 Irrigation Congress also recommended

delivery of water from the proposed project as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each State. The recommendations of the 1904 Irrigation Congress were adopted by the Secretary of the Interior, and the Rio Grande Reclamation Project ("Rio Grande Project" or "Project") was authorized pursuant to the Rio Grande Reclamation Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act").

7. In 1906 and again in 1908, the United States through the Bureau of Reclamation filed notices with the Territorial Engineer of the Territory of New Mexico of reservations of Rio Grande water for the Rio Grande Project, which gave notice that the United States had set aside all unappropriated waters of the Rio Grande for the federal purposes of the Project. The Bureau of Reclamation commenced operation of the Rio Grande Project in 1916.

8. As noted, Rio Grande Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas. The Elephant Butte Irrigation District ("EBID"), a political subdivision of the State of New Mexico, is the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico. The El Paso County Water Improvement District No. 1 ("EPCWID"), a

political subdivision of the State of Texas, is the Rio Grande Project beneficiary of the water from the Rio Grande Project for delivery and use in Texas. On average, the City of El Paso, Texas receives approximately 50% of its water supply from the Rio Grande Project pursuant to contracts with EPCWID for Rio Grande Project water supply.

9. In 1906, the United States and Mexico entered into a Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande. Convention with Mexico for Upper Rio Grande, 34 Stat. 2953 ("1906 Treaty"). This Treaty provided for the delivery at or near El Paso, Texas, and Juarez, Mexico, up to a total maximum of 60,000 acre-feet of water annually from the Rio Grande Project. 1906 Treaty at Article I.

10. The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation. Instead, it relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas. A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact

was executed. The relationship between the Rio Grande Project authorization and the Rio Grande Compact presents unique issues that only this Court can resolve.

11. The State of Texas entered into the Rio Grande Compact under the following fundamental premises: (a) the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact; (b) New Mexico was required to make deliveries into Elephant Butte Reservoir to ensure that the United States could continue to operate the Rio Grande Project, and thereby provide for deliveries of water from the Rio Grande Project as had been previously authorized; and (c) New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico. Unless the United States' operation of the Rio Grande Project is protected, as intended by the Rio Grande Compact and as authorized by the Rio Grande Project Act, Rio Grande Project deliveries of water to southern New Mexico, Texas and Mexico cannot be assured, and the rights of Texas under the Rio Grande Compact cannot be protected.

12. Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project. Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio

Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations.

13. Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries from San Marcial to Elephant Butte Reservoir. These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for the Rio Grande Project absent upstream development that took place after 1929 and 1937. Water is delivered to Elephant Butte Reservoir because it was (and still is) the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

14. Article I(l) of the Rio Grande Compact defines "usable water" as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." Article I also defines "credits" and "debits" as the

amounts of water delivered or not delivered by Colorado or New Mexico above or below their respective delivery obligations. Article VI of the Compact allows for and delineates how "credits" and "debits" are to be accounted. These terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact. These terms have no meaning absent the existence and operation of the Rio Grande Project by the United States.

15. Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929, whenever there is less than 400,000 acre-feet of usable water stored in Rio Grande Project facilities, subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre-feet per annum, or where there are relinquishments of accrued credits available. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in Rio Grande Project storage to 600,000 acre-feet.

16. Article XI of the Rio Grande Compact provides that nothing within the Compact shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of water, at

the point of delivery, be changed hereafter by one signatory state to the injury of another.

17. Article XII of the Rio Grande Compact created the Rio Grande Compact Commission, and requires that the actions of the Commission must be unanimous. Article XIII requires that the terms of the Rio Grande Compact cannot be amended without the unanimous approval of all four parties to the Compact.

18. New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico–Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas. Despite the State of Texas' request that New Mexico take action to cease these diversions and

extractions, these unlawful surface water diversions and extractions of water from beneath the ground have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually. These unlawful surface water diversions and extractions of water from beneath the ground intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico. The unlawful diversion of surface water and extraction of underground water also require more water to be released from Elephant Butte Reservoir depleting Rio Grande Project storage. These extractions also create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water. This requires additional releases of water from Elephant Butte Reservoir, which has a detrimental effect on the amount of water stored in Elephant Butte Reservoir for future use. Depleted reserves at Elephant Butte Reservoir have adverse impacts on future water supplies that should otherwise be available to the Rio Grande Project for delivery in southern New Mexico, Texas and Mexico. These extractions have a direct adverse impact on the amount of water delivered to Texas pursuant to the Rio Grande Project authorization and the Rio Grande Compact. These extractions were not occurring in 1938 when Colorado, New Mexico, and Texas entered into the Rio Grande Compact to equitably apportion these waters. Thus, New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.

19. New Mexico's actions, including the actions of its State Engineer and its Rio Grande Compact Commissioner, have validated and encouraged, rather than prevented, the development of post-Compact depletions of the Rio Grande below Elephant Butte Reservoir. This has resulted in ongoing, material depletions of flows of the Rio Grande at the New Mexico–Texas state line, causing substantial and irreparable injury to Texas. By its failure to control and prevent the proliferation of post-Rio Grande Compact pumping of water hydrologically connected to the Rio Grande, and by its acquiescence in surface water diversions and failure to prevent non-permitted diversion of surface water, New Mexico has ignored and undermined Texas' rights to water from the Rio Grande Project, and has breached and continues to breach its obligations and responsibilities under the Rio Grande Compact.

20. New Mexico has attempted and continues to attempt to control the operation of the Rio Grande Project in contravention of the Rio Grande Project Act and the Rio Grande Compact, through novel interpretations of the Rio Grande Compact that New Mexico has offered in litigation it initiated in the United States District Court in New Mexico (*State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. Civ. 11-691 JB/WDS (D. N.M. filed Aug. 8, 2011)), and in Rio Grande Compact Commission meetings and deliberations. In the United States District Court action, New

Mexico has asked the Court to interpret the Rio Grande Compact incorrectly in contravention of New Mexico's rights and obligations under the Compact, and thereby, among other things, enable New Mexico to vitiate a 2008 agreement among the United States, EBID and EPCWID relating to Project operations and the allocation of Project water to EBID and EPCWID. Operating Agreement for the Rio Grande Project (March 10, 2008); hereafter the "2008 Operating Agreement." The States of New Mexico and Texas are not parties to the 2008 Operating Agreement, nor is Texas a party to this federal court litigation in which New Mexico challenges the 2008 Operating Agreement.

21. New Mexico has also taken positions in actions in New Mexico state court advancing novel views of the application of Section 8 of the 1902 Reclamation Act, 43 U.S.C. § 383, which are adverse to Texas' rights under the Rio Grande Compact and Rio Grande Project Act. These positions, if adopted, would result in a decrease of the lawful amounts of Rio Grande Project water available for delivery by the United States from the Rio Grande Project, including water apportioned to Texas, in contravention of the Rio Grande Project Act and the Rio Grande Compact. Specifically, New Mexico has asserted that the Rio Grande Project is not entitled to the full benefit of the waters of the Rio Grande below Elephant Butte Reservoir, and that New Mexico pumpers of water found under the ground have a prior right to Rio Grande Project water, regardless of the fact that this water is

hydrologically connected to the Rio Grande and originated from the Rio Grande and the Rio Grande Project. In essence, New Mexico asserts that so long as it has made Rio Grande Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir. Thus, water allocated to Texas from the Rio Grande Project and the Rio Grande Compact would never leave New Mexico. These actions constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact.

22. Consistent with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the State of Texas has adjudicated the Rio Grande above Fort Quitman, Texas, entering a final decree in 2006 binding on the United States and EPCWID. In furtherance, Texas issued a Certificate of Adjudication in 2007 allowing for the diversion of water sufficient to meet Rio Grande Project and Rio Grande Compact diversion and use rights in Texas. The Certificate of Adjudication assumes compliance by the State of New Mexico with the provisions of the Rio Grande Project Act and the Rio Grande Compact. Absent New Mexico's compliance with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the judicial decree entered into in Texas can have no practical effect, and cannot serve as a source of legal stability to those in Texas who obtain water from the Rio Grande Project. The Certificate of

Adjudication and the Final Decree of the 327th Judicial District Court in El Paso County, Texas, have not been given full faith and credit by the State of New Mexico, in violation of Article IV, Section 1 of the United States Constitution.

23. The aforementioned actions of New Mexico have resulted in the Rio Grande Compact Commission's inability to unanimously agree on appropriate accounting as is required under Articles XII and XIII of the Rio Grande Compact.

24. The acts and conduct of New Mexico, its officers, citizens and subdivisions in failing, neglecting and refusing to deliver water to Texas in available quantities required by the Rio Grande Project Act and the Rio Grande Compact, have caused grave and irreparable injury to Texas and its citizens who are entitled to receive and use the water apportioned to them pursuant to the Rio Grande Project Act and the Rio Grande Compact.

25. Grave and irreparable injury will be suffered in the future by Texas and its citizens unless relief is afforded by this Court to prevent New Mexico, its officers, citizens and political subdivisions from using and withholding water that Texas is entitled to, and which New Mexico is obligated to deliver, pursuant to the provisions of the Rio Grande Project Act and by the Rio Grande Compact.

26. New Mexico refuses to comply with its obligations under the Rio Grande Compact with respect to the delivery of Texas' apportionment of water under the Rio Grande Compact to the New Mexico–Texas state line, despite requests by Texas that New Mexico do so.

27. Texas has sustained damages arising from New Mexico's breach of the Rio Grande Compact, such damages consisting of the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act, in an amount to be proven at trial.

28. Texas has no effective remedy to enforce its rights under the Rio Grande Project Act and the Rio Grande Compact against New Mexico, except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Texas respectfully prays that the Court:

1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;

2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio

Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;

3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act; and

4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Respectfully submitted,

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January 2013

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado	M.C. Hinderlider
For the State of New Mexico	Thomas M. McClure
For the State of Texas	Frank B. Clayton

who, after negotiations participated in by S.O. Harper, appointed by the President as the\representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated *Colorado, New Mexico, Texas, and the United States*, respectively.

(b) *The Commission* means the agency created by this Compact for the administration thereof.

(c) The term Rio Grande Basin means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The *Closed Basin* means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term *tributary* means any stream which naturally contributes to the flow of the Rio Grande.

(f) *Transmountain Diversion* is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) *Annual Debits* are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) *Annual Credits* are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) *Accrued Debits* are the amounts by which the sum of all annual debits exceeds sum of all annual credits over any common period of time.

(j) *Accrued Credits* are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) *Project Storage* is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet.

(l) *Usable Water* is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) *Credit Water* is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) *Unfilled Capacity* is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) *Actual Release* is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) *Actual Spill* is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) *Hypothetical Spill* is the time in any year at which usable water would have spilled from project

storage if 790,000 acre feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE III

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year,

shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

DISCHARGE OF CONEJOS RIVER
Quantities in thousands of acre feet

Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	476

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U.S.G.S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U.S.G.S. gaging station near Ortiz and the natural flow of San Antonio River at the U.S.G.S. gaging station at Ortiz, both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U.S.G.S. gaging stations near Los Sauces during the calendar year.

DISCHARGE OF RIO GRANDE EXCLUSIVE OF CONEJOS RIVER

Quantities in thousands of acre feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1,000	430
1,100	540
1,200	640
1,300	740
1,400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Notre is the recorded flow of the Rio Grande at the U.S.G.S. gaging station near Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U.S.G.S. gaging station near Lobatos, less the discharge of Conejos River at its Mouths, during the calendar year.

The application of these schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water of [sic] exceeds three hundred fifty parts per million.

ARTICLE IV

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station:

DISCHARGE OF RIO GRANDE AT OTOWI BRIDGE AND AT SAN MARCIAL EXCLUSIVE OF JULY, AUGUST AND SEPTEMBER

Quantities in thousands of acre feet

Otowi Index Supply (5)	San Marcial Index Supply (6)
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1,000	742
1,100	839
1,200	939
1,300	1,042
1,400	1,148
1,500	1,257
1,600	1,370
1,700	1,489
1,800	1,608
1,900	1,730

2,000	1,856
2,100	1,985
2,200	2,117
2,300	2,253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U.S.G.S. gaging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir to the end that the records at these three stations may be correlated. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE V

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable, or cannot be obtained, at any of the stream gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE VI

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no

annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre-feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded

in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

ARTICLE VII

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and releases at such average rate; provided, further, that Colorado, or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico

may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

ARTICLE IX

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the

United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas

shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules

and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners, and until any changes in this Compact are ratified by the legislatures of the respective states and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico.

ARTICLE XV

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes.

ARTICLE XVII

This Compact shall become effective when ratified by the legislatures of each of the signatory states and consented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each state to the Governors of the other states and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory states of the consent of the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original,

one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

(Sgd.) M. C. HINDERLIDER
(Sgd.) THOMAS M. McCLURE
(Sgd.) FRANK B. CLAYTON

APPROVED:
(Sgd.) S. O. HARPER

RATIFIED BY:
Colorado, February 21, 1939
New Mexico, March 1, 1939
Texas, March 1, 1939
Passed Congress as Public Act No. 96, 76th Congress, Approved by the President May 31, 1939

No. _____, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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STATE OF TEXAS,

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Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of Texas, in support of its Motion for Leave to File Complaint, submits the following:

INTRODUCTION

Texas seeks to invoke the Court's original jurisdiction to obtain a determination and enforcement of its rights as against the State of New Mexico to the waters of the Rio Grande pursuant to the Rio Grande Compact, 53 Stat. 785 (1939) (hereafter "Rio Grande Compact" or "Compact"). The Rio Grande Compact is reprinted in the Appendix to

the Complaint ("App. to Compl."). Texas brings its claims to this Court after first attempting to resolve with New Mexico the fundamental differences Texas has with New Mexico's interpretations of and actions with respect to the Rio Grande Compact.

The Rio Grande Compact is unique because it does not set forth a specific New Mexico delivery requirement at the New Mexico–Texas state line. Instead, it requires New Mexico to deliver water into Elephant Butte Reservoir, the major storage facility for the Rio Grande Reclamation Project ("Rio Grande Project"). The Rio Grande Project was authorized pursuant to the Rio Grande Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act"). The Rio Grande Project, including the reservation of all necessary water rights, pre-dates the Rio Grande Compact, and is the basis and provides the means for the equitable apportionment of the waters of the Rio Grande between Texas and New Mexico.

As detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation and integrity of the Rio Grande Project. The Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual

arrangements. In order for water to be delivered to Rio Grande Project beneficiaries in southern New Mexico and in Texas, it must be released from Rio Grande Project facilities, and allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas. New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico. New Mexico's actions, in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas, violates the purpose and intent of the Rio Grande Compact, causing grave and irreparable injury to Texas.

New Mexico has repeatedly violated its obligations under the Rio Grande Compact in derogation of Texas' rights in the Rio Grande Project and under the Rio Grande Compact. New Mexico's breach of its Rio Grande Compact obligations falls within two primary categories. First, New Mexico has allowed post-Compact diversions of surface water and of underground water below Elephant Butte Dam, for use in New Mexico, thereby depleting the water available from the Rio Grande Project, and to which Rio Grande Project beneficiaries in southern New Mexico and in Texas are entitled pursuant to the Rio Grande Project Act and the Rio Grande Compact. Second, in state and federal court proceedings, and through its Rio Grande Compact Commissioner, New Mexico has posited misguided interpretations of the Rio Grande Project Act and the

Rio Grande Compact in an effort to wrest control of the operations of the Rio Grande Project from the United States, and to deprive Texas of its rights in the Rio Grande Project and under the Rio Grande Compact.

Neither the New Mexico state court litigation, nor the litigation that New Mexico initiated in federal district court in New Mexico, provide appropriate forums to resolve Texas' dispute with New Mexico. Texas is not a party to either of these actions, and is not otherwise subject to the jurisdiction of these courts. Decisions of the Rio Grande Compact Commission must be unanimous, and there is a current impasse on critical issues regarding the rights and obligations of New Mexico and Texas under the Rio Grande Project Act and the Rio Grande Compact. Given this impasse, no resolution of Texas' dispute with New Mexico will be forthcoming in the context of the Rio Grande Compact Commission. Only this Court, through the exercise of its original jurisdiction, can resolve the disputes as between Texas and New Mexico over the interstate waters of the Rio Grande.

New Mexico's violations of the Rio Grande Compact have caused, and if not remedied will continue to cause, direct, immediate, grave, and irreparable injury to Texas and its citizens, by preventing Texas from receiving the amount of Rio Grande Project water to which it is entitled and which is protected by the Rio Grande Compact. The Rio Grande is the primary, at some places the only,

source of supply for agricultural lands within Texas that are the intended beneficiaries of Texas' allocation of Rio Grande water. In addition, the Rio Grande Project water supply constitutes, on average, 50% of the annual water supply for the City of El Paso, Texas.

So long as New Mexico refuses to acknowledge its Rio Grande Compact obligations to Texas, no amount of negotiation or mediation can address Texas' claims. And so long as the matter continues unresolved by this Court, New Mexico can simply continue to divert, pump and use water in excess of its Rio Grande Compact apportionment, to the continued detriment of Texas.

BACKGROUND STATEMENT

1. The Rio Grande Basin

The Rio Grande is an interstate and international river which originates in the State of Colorado, flows in a southerly direction into and through New Mexico and then into Texas. The Rio Grande, after crossing the New Mexico–Texas state line, forms the international boundary between the United States and the United States of Mexico ("Mexico").[2] A map of the Rio Grande Basin is

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[2] The Rio Grande has also been described as follows: "The Rio Grande is one of the historic rivers of North America. It is also one of the longest. It rises in the high Rockies of southern

Footnote continued on following page.

included in the Appendix to this Brief at A-1; Texas Commission on Environmental Quality.

2. The Rio Grande Project

In 1904, the Twelfth National Irrigation Congress was held in El Paso, Texas, for the purpose of addressing and resolving a dispute between interests in New Mexico and interests in Texas over the waters of the Rio Grande. Twelfth National Irrigation Congress Held at El Paso, Texas (Nov. 15-18, 1904); hereafter "1904 Irrigation Congress." The result of the 1904 Irrigation Congress was a recommendation for the construction by the United States of a federal dam and reservoir near Engle, New Mexico (which became Elephant Butte Dam and Reservoir), to be operated as a federal reclamation project pursuant to the Reclamation Act of 1902 by the United States Bureau of Reclamation ("Bureau of Reclamation"). The 1904 Irrigation

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Colorado and flows from Colorado through New Mexico, reaches Texas near El Paso and thence flows in a general southeasterly direction to the Gulf of Mexico near Brownsville. By act of the Congress of the Republic of Texas of December 19, 1836, the river was established as the boundary between Texas and Mexico." *State v. Hidalgo County Water & Improvement District No. 18*, 443 S.W.2d 728, 733-34 (Tex. Civ. App – Corpus Christi, 1969) *writ refused, no reversible error.*

Congress also recommended allocation of water between water users in Texas and those in southern New Mexico based on the ratio of Project lands within each state. The 1904 Irrigation Congress recommendations were adopted by the Secretary of the Interior, and were authorized pursuant to the Rio Grande Project Act. Historically, this ratio of Rio Grande Project lands has been 57% in New Mexico and 43% in Texas. The Bureau of Reclamation commenced operation of the Rio Grande Project in 1916. A map of the Rio Grande Project is included in the Appendix to this Brief at A-2; U.S. Dept. of the Interior, Bureau of Reclamation, Upper Colorado Region, *Legal and Institutional Framework for Rio Grande Project Water Supply and Use . . . a legal hydrograph, Final Draft* (Oct. 1995) at Figure 1.

In 1906, the United States contracted for the water developed by the Rio Grande Project with (1) the Elephant Butte Water Users Association, a predecessor entity to the current Elephant Butte Irrigation District ("EBID"), a political subdivision of the State of New Mexico, for the water allocated and apportioned for use within New Mexico; and (2) with the El Paso Valley Water Users Association, a predecessor entity to the current El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, for the water allocated and apportioned for use within Texas. Agreement (June 27, 1906).

In order to effectuate the federal purposes of the Rio Grande Project, in 1906 and again in 1908,

the United States filed notices with the Territorial Engineer of the Territory of New Mexico for reservations by the United States of Rio Grande water for the Rio Grande Project, which gave notice that the United States had acquired and set aside all unappropriated waters of the Rio Grande for the purposes of the Rio Grande Project. Notice of Water Appropriation, Rio Grande Project (Jan. 23, 1906), and Supplemental Notice of Water Appropriation (April 1908), found at *Bean v. United States*, 163 F.Supp. 838, 840 n.1 (Ct.Cl. 1958). Accordingly, the Rio Grande Project water rights include all of the waters of the lower Rio Grande unappropriated at the time of the planning and authorization of the Rio Grande Project, inclusive of all water derived from Rio Grande Project releases. Return flows, drain flows, seepage and tributary groundwater are essential to the ability of the United States to operate the Rio Grande Project, and fully meet the rights of Texas to the waters of the Rio Grande.

3. United States' Treaty with Mexico

In 1906, the United States and Mexico entered into the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande. Convention with Mexico for Upper Rio Grande, 34 Stat. 2953; hereafter the "1906 Treaty". The 1906 Treaty provided for delivery of up to 60,000 acre-feet of water annually to Mexico from the Rio Grande Project at or near El Paso, Texas, and Juarez, Mexico. 1906 Treaty, at Article I. The water provided for under the 1906 Treaty is to be

distributed through the year in the same proportions as the water supplies delivered to Texas in the vicinity of El Paso, Texas, pursuant to a schedule provided for in the Treaty. 1906 Treaty, at Article II.

4. The Rio Grande Compact

A. A Brief History of Negotiations and Adoption of the Compact

Prior to and between 1905 and 1929, water development occurred or was threatened to occur within the States of Colorado and New Mexico on the Rio Grande or its tributaries upstream of Elephant Butte Reservoir. As a consequence, a moratorium on the development of water upstream of Elephant Butte Reservoir in both New Mexico and Colorado was effectively imposed. (This moratorium was enforced by the Secretary of the Interior through the refusal to grant rights-of-way across public lands in Colorado and New Mexico that were needed in order to perfect the diversion of Rio Grande water.) In 1929, Colorado, New Mexico and Texas entered into a Temporary Interstate Compact that was later consented to by the United States, to address the interstate allocation of the waters of the Rio Grande. Act of June 17, 1930, ch. 506, 46 Stat. 767; hereafter "1929 Compact." This 1929 Compact was by its terms only an interim resolution of the interstate disputes. 1929 Compact, Articles VII, XIV and XVI.

Prior to the termination of the 1929 Compact, the Secretary of the Interior signaled his intent to

lift the moratorium on the further development of waters of the Rio Grande, and various parties within Colorado and New Mexico indicated that they would refuse to enter into a long term Compact after the term of the 1929 Compact expired. In response, the State of Texas filed an original action in this Court which was accepted and in which a Special Master was assigned. *Texas v. New Mexico, et al.*, 296 U.S. 547 (1935). Trial of this original action had begun, with testimony and evidence introduced when, in 1938, the final Rio Grande Compact was approved. As a consequence of the 1938 Compact, that original action before this Court was dismissed. *Texas v. New Mexico, et al.*, 308 U.S. 510 (1939).

B. An Overview of the Compact

The States of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938. The Rio Grande Compact was ratified thereafter by the respective state Legislatures, and was consented to and approved by the United States pursuant to an Act of Congress. Act of May 31, 1939, ch. 155, 53 Stat. 785, App. to Compl. at App. 20.

As noted, the Rio Grande Compact is unique in several material ways. The most significant is that it incorporates the basic assumption of the authorization, construction and operation of the Rio Grande Project by the United States. Without this basic assumption the Rio Grande Compact would have little meaning and would be incapable of fulfilling the Rio Grande Compact rights of Texas.

In fact, the Rio Grande Compact is a means of protecting the Rio Grande Project, its operations and the allocations of water to Rio Grande Project beneficiaries.

Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project. For example, Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations. App to Compl. at App. 5-8.

Additional manifestations of the intent to protect the Rio Grande Project are found in Articles I, IV and VII of the Rio Grande Compact. App. to Comp. at App. 1-4, 9-11, and 14. Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. App. to Compl. at App. 9-11. In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries to Elephant Butte Reservoir. Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico (Feb. 24, 1948). These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are

based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for Rio Grande Project operations absent upstream development that took place after 1929 and 1937. Water is delivered to Elephant Butte Reservoir because it was (and still is) the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

Article I(l) of the Rio Grande Compact defines "usable water" as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." App. to Compl. at App. 3. Article I also defines "credits" and "debits" as the amounts of water delivered or not delivered by Colorado or New Mexico above or below their respective delivery obligations. *Id.* at App. 2. Article VI of the Rio Grande Compact allows for and delineates how "credits" and "debits" are to be accounted. *Id.* at App 11-14. All of these terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact, because these terms have no meaning absent the existence and operation of the Rio Grande Project by the United States.

Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs

constructed after 1929 whenever there is less than 400,000 acre-feet of usable water stored in Rio Grande Project facilities, subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre-feet per annum, or where there are relinquishments of accrued credits available. App. to Compl. at App. 14. Credits are prescribed in Article VI of the Rio Grande Compact. *Id.* at App. 11-14. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in Rio Grande Project storage to 600,000 acre-feet. *Id.* at App. 14-15.

Article XI of the Rio Grande Compact provides that nothing within the Compact shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. App. to Compl. at App. 16.

Article XII of the Rio Grande Compact created the Rio Grande Compact Commission, and requires that the actions of the Rio Grande Compact Commission be unanimous. App. to Compl. at App. 17-18. Article XIII of the Compact requires that the terms of the Rio Grande Compact cannot be

amended without the unanimous approval of all four parties to the Compact. *Id.* at App. 18.

C. Rio Grande Compact Apportionment

The allocations of water, provided for as part of the authorization of the Rio Grande Project, were intended by the Rio Grande Compact to also apportion the waters of the Rio Grande between New Mexico and Texas. The stated purpose of the Rio Grande Compact was "for the purpose of effecting an equitable apportionment of such waters [of the Rio Grande above Fort Quitman, Texas]." App. to Compl., Preamble at App. 1. The Rio Grande Compact provides for specific Colorado and New Mexico delivery requirements, including the New Mexico requirement to deliver specified quantities of water into Rio Grande "Project Storage." *Id.*, Article IV at App. 9-11. The majority of defined terms within the Rio Grande Compact address the apportionment and use of water among Colorado, New Mexico and Texas, all within the context of the Rio Grande Project. *See, e.g., Id.*, Articles I(g)-(q) at App. 2-4.

5. Post-Compact Developments in the Rio Grande Basin in Southern New Mexico and the Present Controversy

The Rio Grande Compact is intended to protect, from development upstream in New Mexico and Colorado, the use of water within southern New

Mexico and Texas that existed prior to the authorization of the Rio Grande Project. The United States, in 1906 and again in 1908, as part of the planning and implementation of the Rio Grande Project, set aside all of the unappropriated waters of the Rio Grande that were necessary for the operation of the Rio Grande Project. Notice of Water Appropriation and Supplemental Notice of Water Appropriation, *supra*. The Rio Grande Compact succeeded to these water rights.

Consistent with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the State of Texas has adjudicated the Rio Grande above Fort Quitman, Texas, entering a final decree binding on the United States and EPCWID. In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin, *Final Decree* (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006). In furtherance, Texas has issued a Certificate of Adjudication allowing for the diversion of water sufficient to meet Rio Grande Project and Rio Grande Compact diversion and use rights in Texas. Certificate of Adjudication No. 23-5940 (March 7, 2007). The Certificate of Adjudication assumes compliance by the State of New Mexico with the provisions of the Rio Grande Project Act and the Rio Grande Compact. Absent New Mexico's compliance with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the judicial decree entered into in Texas can have no practical effect, and cannot serve as a

source of legal stability to those in Texas who obtain water from the Rio Grande Project. The Certificate of Adjudication and the Final Decree of the 327th Judicial District Court in El Paso County, Texas, have not been given full faith and credit by the State of New Mexico, in violation of Article IV, Section 1 of the United States Constitution.

As also noted above, the State of New Mexico has allowed and authorized the diversion, extraction and use, in New Mexico, of Rio Grande Project water that has been allocated to Texas. These diversions, extractions and use include Rio Grande Project return flows and other underground water that is hydrologically connected to the Rio Grande, and to which the United States has superior rights, including the right to deliver that water to Texas. Additionally, New Mexico has permitted the extractions of tributary groundwater that create underground voids that must be filled by releases from the Rio Grande Project before Rio Grande Project water can be delivered to Texas. These actions allowed and authorized by New Mexico have increased to a level that cannot be sustained, and which are causing and will continue to cause harm to Texas, if New Mexico is not enjoined by this Court.

New Mexico has refused to address Texas' concerns and has refused to remediate the harm caused by its unlawful acts in violation of the Rio Grande Compact. Instead, New Mexico has attempted to make permanent its unlawful actions through assertions made in a New Mexico state court

water adjudication. *State of New Mexico v. Elephant Butte Irrigation District* (3d Judicial Dist. Court of Doña Ana County, New Mexico, No. CV-96-888). There, New Mexico is asserting and advancing novel theories of law that are contrary to rights held by the United States for the Rio Grande Project as well as the Rio Grande Compact, and which would deprive Texas of water it is entitled to under the Rio Grande Project Act and the Rio Grande Compact. In that case, New Mexico denies that it has any responsibility to ensure that water released for the benefit of Texas is not intercepted and used in New Mexico. Texas is not a party to that New Mexico state court litigation.

The United States, working with EBID and EPCWID, attempted to address at least a portion of the problem created by New Mexico's unlawful use of Rio Grande Project water, through the Operating Agreement for the Rio Grande Project (March 10, 2008), hereafter the "2008 Operating Agreement." This agreement sought to identify otherwise unsanctioned use of Rio Grande Project water by EBID landowners and to account for that use in a manner that would debit the water used from EBID's Rio Grande Project allocations. The agreement also sought to allow both EBID and EPCWID to "bank" water in Elephant Butte Reservoir that was not used in one year for use in later years, thereby allowing for the more efficient management of the Rio Grande Project, and ensuring that the respective Rio Grande Compact apportionments can be maintained. In response,

New Mexico challenged the 2008 Operating Agreement in federal district court in New Mexico. *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. Civ. 11-691 JB/WDS (D. N.M. filed Aug. 8, 2011). There, New Mexico is advancing novel interpretations of the Rio Grande Compact in an effort to wrest operational control of the Rio Grande Project from the United States. Texas is not a party to that New Mexico federal district court litigation.

ARGUMENT

This Court has original and exclusive jurisdiction over cases and controversies between two or more states. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citing *Virginia v. West Virginia*, 206 U.S. 290, 317-19 (1907)); *see Kansas v. Colorado*, 514 U.S. 673 (1995); *Oklahoma and Texas v. New Mexico*, 501 U.S. 221 (1991). It is necessary for the Court to exercise its original jurisdiction here to declare and enforce the rights of the State of Texas under the Rio Grande Compact.

The Court examines two factors in deciding whether to grant leave to file a complaint in an original action. First, the Court considers the "nature of the interest of the complaining State," with a focus on the "seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77

(1992) (citation omitted). Second, the Court assesses "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Applying these factors, the Court should exercise its original jurisdiction in this case, and Texas should be granted leave to file its Complaint.

1. The Seriousness and Dignity of Texas' Claims Warrant Exercise of the Court's Original Jurisdiction

A dispute over the waters of interstate rivers apportioned by a compact is the archetypal dispute that can only be resolved by this Court. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. at 571 n.18; *see Kansas v. Colorado*, 185 U.S. 125, 143-44 (1902). New Mexico's prior and ongoing violations of the Rio Grande Compact, if not remedied, will continue to cause direct, immediate, grave and irreparable injury to Texas. If Texas and New Mexico were fully sovereign, New Mexico's intentional violations of the Rio Grande Compact would amount to *casus belli*. An injury of this kind implicates this Court's jurisdiction.

An interstate compact requires congressional consent, and is essentially a federally recognized treaty between two or more sovereign States. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (stating that an interstate compact "adapts

to our Union of sovereign States the age-old treaty-making power of independent sovereign nations"). Texas brings this action as a sovereign party to the Rio Grande Compact. In this capacity, it asserts a sovereign interest in enforcing its rights under the Rio Grande Compact. Texas' demand for recognition of these rights by another sovereign is an "easily identified" sovereign interest that is properly asserted in this interstate action. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (States' authority to apportion interstate rivers by Compact is "a part of the general right of sovereignty.").

Texas claims that New Mexico is depriving it of its lawful share to the Rio Grande, an interstate stream. In this claim, Texas asserts a substantial sovereign interest that occupies the traditional scope of this Court's original jurisdiction. Texas claims that New Mexico has disregarded its obligations under the Rio Grande Compact, including, but not limited to, allowing and authorizing its citizens to capture and consume Rio Grande Project water intended by the Rio Grande Compact and the Rio Grande Project Act for delivery and use in Texas. New Mexico asserts in response that the enormous amounts of pumping of underground water occurring in southern New Mexico are not affected by the Rio Grande Compact, and that it has no obligation at all to ensure Texas' allocation at the New Mexico–Texas state line. In addition, New Mexico asserts that it can impede and interfere with the United States' operation of the Rio Grande Project to the detriment

of Texas. The dispute centers on a fundamental difference in the interpretation of the plain terms of the Rio Grande Compact, and the parties' intent in executing the Compact.

This Court has acknowledged that it has a unique duty to entertain claims concerning the application and understanding of interstate compacts. *Texas v. New Mexico*, 462 U.S. at 567-68. Here, Texas and New Mexico fundamentally disagree as to the Compact's meaning. So long as New Mexico refuses to acknowledge its Rio Grande Compact obligations to Texas, no amount of negotiation or mediation can address Texas' claims. Furthermore, so long as the matter continues to be unresolved by this Court, New Mexico can simply continue to divert, pump and use water in excess of its Rio Grande Compact apportionment, and capture Rio Grande Project water allocated to Texas, to the direct, immediate, and irreparable injury to Texas' Compact rights. The dispute over the Rio Grande Compact's interpretation has a considerable impact on Texas because the meaning of the Compact directly influences the amount of water that Texas receives. Without the water allocated to Texas by the Rio Grande Compact, Texas water users will continue to suffer adverse consequences.

2. The State of Texas Has No Alternative Forum

Texas has no alternative forum in which the issue may be resolved; consequently, the Court

should exercise its original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. at 77. In evaluating the availability of an alternative forum, this Court considers whether the alternative may provide "full relief" for the States. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). In this case, no alternative forum will provide "full relief" for Texas.

This Court has stated, "[t]here is no doubt that this Court's jurisdiction to resolve controversies between two States . . . extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. at 567. This Court further explained, "[a] Compact is, after all, a contract," and "[a] court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for." *Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987) (citations omitted). This Court is the only court in which the State of Texas is permitted to seek such a remedy. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Rio Grande Compact Commission is not an adequate alternative forum for resolution of the dispute that gives rise to this lawsuit. While Article XII of the Rio Grande Compact provides the Commission with powers to "administer" the provisions of the Compact, it does not endow in the Commission the power to provide a remedy for breach of the Compact. App. to Compl. at App. 16-

18. Moreover, the Rio Grande Compact does not create an adequate mechanism for resolving the issues concerning Compact application and violations raised in the Complaint. Instead, Article XI recognizes that the States retain their rights to seek adjudication of allegations of breach of the Rio Grande Compact. Article XI provides:

> New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another.

App. to Compl., Article XI at App. 16.

Thus, this Court is the only forum with the ability to resolve the dispute between Texas and New Mexico. This Court has held that "[b]y ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Texas v. New Mexico*, 482 U.S. at 128.

In *Texas v. New Mexico*, the Pecos River Compact, like the Rio Grande Compact, provided a procedure whereby the Pecos River Commission could make some determinations arising incident to its administration of that compact. New Mexico argued that the Court lacked jurisdiction because the Pecos River Compact made the Pecos River Commission the sole arbiter of disputes arising under that compact. This Court disagreed, and stated:

> In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the States' rights.

Texas v. New Mexico, 462 U.S. at 569-70.

This same reasoning applies in the present case. The Rio Grande Compact has no "explicit provision or other clear indications" forbidding relief in this Court. Quite the contrary, the States' retention of their ability to invoke the original jurisdiction of this Court was a vital consideration when they entered the Rio Grande Compact, just like when they entered the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. at 569. Article XI of the Rio Grande Compact evidences the intent of the parties to the Compact to seek relief in this Court. App. to Compl. at App. 16. As such, the plain language of

the Rio Grande Compact provides Texas' right to bring this suit.

Additionally, the Rio Grande Compact Commission is not capable of resolving the present dispute. Article XII of the Compact requires that the actions of the Commission be unanimous. App. to Compl. at App. 17-18. Article XIII of the Compact requires that the terms of the Compact cannot be amended without the unanimous approval of all three states party to the Compact. *Id.* at App. 18. New Mexico's actions, and its disregard for the Rio Grande Compact's apportionment requirements, have resulted in the Commission's inability to reach unanimous consent on important issues. Texas' current cause of action is beyond the scope of the Commission's administration of the Rio Grande Compact because it seeks a declaration, enforcement and protection of Texas' rights, for which a less than unanimous Commission can provide no remedy.

Moreover, even if the Rio Grande Compact provided a mechanism for addressing these issues, resolution of the dispute through the Commission is not possible because the States are in a stalemate over threshold legal questions regarding the proper interpretation of the Compact. As explained above, New Mexico continues to disregard the plain terms and intent of the Rio Grande Compact and the Commission can achieve no consensus. As a result, grave and irreparable injury continues to be suffered by Texas and its citizens and Texas has no recourse but to seek relief in this Court.

This Court has explained that the solution for a stalemate between States that are parties to a Compact "is judicial resolution of such disputes as are amenable to judicial resolution . . . ." *Texas v. New Mexico*, 462 U.S. at 565. Here, the dispute arises from differences in Rio Grande Compact interpretation, and from New Mexico's refusal to recognize and respect Texas' Rio Grande Compact rights to its allocation of Rio Grande Project water. This Court has recognized the necessity of a court remedy for a downstream State, in Texas' position, suffering violations under a compact where an administrative body requires unanimous concurrence of the States in order to act. *Id.* at 568-69 ("New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions . . . ."). Only this Court can provide that remedy.

Finally, the ongoing New Mexico state court adjudication and the New Mexico federal district court action are not appropriate forums for resolution of this dispute. In the New Mexico state court water adjudication, New Mexico has asserted and advanced novel theories of law that are contrary to the Rio Grande Compact. The State of Texas is not a party to the New Mexico adjudication and is not otherwise subject to the jurisdiction of the New Mexico state court. Additionally, in the New Mexico federal district court action against the United States, New Mexico has raised significant issues associated with the Rio Grande Compact and its

interpretation. Neither the State of Colorado nor the State of Texas is a party to this litigation, and the State of Texas is not otherwise subject to the jurisdiction of that court. Accordingly, the New Mexico state court adjudication and the New Mexico federal district court action do not offer Texas an alternative forum for relief. "[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States." *Texas v. New Mexico*, 462 U.S. at 569 n.15 (quoting Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 701 (1925)). Since no single state can unilaterally resolve Rio Grande Compact water allocations, this dispute is only capable of resolution in this Court.

Because Texas' claim that New Mexico has breached the Rio Grande Compact is serious and dignified, and there is no alternative forum in which adequate relief may be obtained for New Mexico's ongoing and escalating violations of the Compact, this Court should invoke its original jurisdiction in this case.

CONCLUSION

The Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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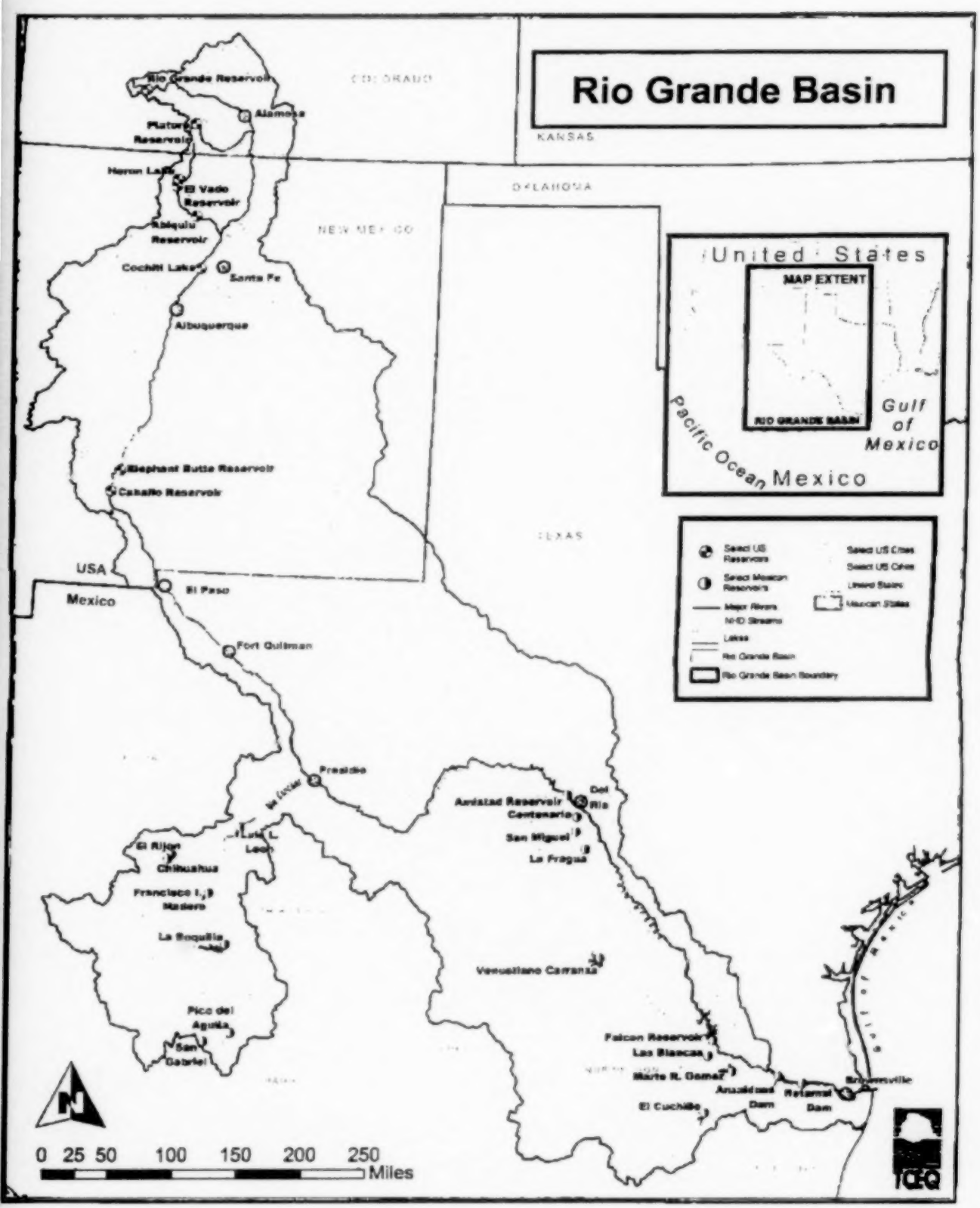
Rio Grande Basin
COLORADO
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NEW MEXICO
TEXAS
Rio Grande Reservoir
Alamosa
Platoro Reservoir
Heron Lake
El Vado Reservoir
Abiquiu Reservoir
Cochiti Lake
Santa Fe
Albuquerque
Elephant Butte Reservoir
Caballo Reservoir
USA
Mexico
El Paso
Fort Quitman
Presidio
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La Fragua
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Pico del Aguila
San Gabriel
Falcon Reservoir
Las Blancas
Marte R. Gomez
Anzalduas Dam
Retamal Dam
El Cuchillo
Brownsville
United States
MAP EXTENT
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Gulf of Mexico
Pacific Ocean
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Major Rivers
NHD Streams
Lakes
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SAN MARCIAL GAGING STATION
ELEPHANT BUTTE RESERVOIR
TRUTH OR CONSEQUENCES
ELEPHANT BUTTE DAM AND POWERPLANT
CABALLO RESERVOIR
CABALLO DAM
ARREY CANAL
RIO GRANDE
NELSON CANYON
LUCERO DIKE
LEASBURG DIVERSION DAM
LEASBURG CANAL
Las Cruces
MESILLA DIVERSION DAM
EASTSIDE CANAL
WESTSIDE CANAL
Chamberino
NEW MEXICO
TEXAS
La Union
NEW MEXICO
UNITED STATES
MEXICO
AMERICAN DIVERSION DAM
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AMERICAN CANAL
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Socorro
Juarez
FRANKLIN CANAL
RIVERSIDE DIVERSION DAM
San Elizario
Fabens
RIVERSIDE CANAL
Tornillo
TORNILLO CANAL
HUDSPETH REGULATING RESERVOIR NO. 1
HUDSPETH CANAL
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AGRICULTURAL LANDS IN MEXICO
LOCATION MAP
UNITED STATES
MEXICO
RIO GRANDE PROJECT

Figure 1

RECORD AND BRIEFS

No. 22O141 Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To File Bill Of Complaint

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF FOR EL PASO COUNTY WATER IMPROVEMENT DISTRICT AS *AMICUS CURIAE*

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas' Motion for Leave to File Complaint ("Motion") pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

Texas' Motion should be granted. Texas brings to this Court a significant, serious, and dignified dispute regarding the State of New Mexico's violations and misinterpretations of the Rio Grande Compact, an interstate water compact between Texas, New Mexico, and the State of Colorado. Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). The Rio Grande Compact was designed to protect the operational integrity of the Rio Grande Reclamation Project, a federal interstate reclamation project ("Rio Grande Project" or "Project"), which assures delivery

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. EPCWID is a Texas political subdivision, equivalent to a county, *see Bennett v. Brown Cnt'y Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 206 (2009), and therefore, pursuant to Rule 37.4 of this Court, files this brief as *amicus curiae* without seeking the consent of the parties or order of the Court.

of the water apportioned to Texas under the Rio Grande Compact. As one of two beneficiaries of the Rio Grande Project, EPCWID has a unique and vital interest in this Court's resolving the interstate dispute between Texas and New Mexico with regard to the waters of the Rio Grande. Without this Court's review of the claims raised in Texas' Complaint, New Mexico's violations and misinterpretations of the Rio Grande Compact would remain unaddressed. Absent such review, the water to which Texas is entitled will not be available to EPCWID, and EPCWID will not be able to supply water to its users, or its supplies would be drastically reduced. The water users of EPCWID include thousands of farmers, the municipalities of Canutillo, Anthony, Socorro, and Clint, Texas, and the City of El Paso, Texas, with a population of approximately 800,000 and which provides water to many public and private schools, hospitals, the University of Texas at El Paso, the Texas Tech University Medical School, and the Lower Valley Water District. Without an adequate water supply EPCWID and its users will suffer irreparable injuries and damages.

In its Complaint, Texas prays that this court:

1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;

2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio Grande in accordance with the

> provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;
>
> 3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act; and
>
> 4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Complaint, *State of Texas v. States of New Mexico and Colorado*, No. 22O141 ORG (filed Jan. 8, 2013) ("Complaint"), at pp. 15-16.

Texas alleges, in pertinent part, that New Mexico has violated and misinterpreted the Rio Grande Compact in two fundamental respects: (1) by allowing the interception and conversion of Rio Grande water in New Mexico after it has been released from Elephant Butte Dam for use by downstream users in Texas, including EPCWID, under the Rio Grande Compact, Complaint at ¶¶ 18-19; and (2) by interfering with and attempting to control the operation of the Rio Grande Project by the United States Bureau of Reclamation ("Bureau of Reclamation") in contravention of the Rio Grande Compact, the Rio Grande Project Act, and a 2008 Operating Agreement among

the United States, the Elephant Butte Irrigation District ("EBID"), and EPCWID, Complaint at ¶¶ 20-21. The Rio Grande Compact requires New Mexico to deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, the primary storage reservoir for the Rio Grande Project. Rio Grande Compact, Art. IV. Upon delivery to Elephant Butte Reservoir, "that water is allocated and belongs to the Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." Complaint at ¶ 4.

The basis for the dispute – that New Mexico is depriving Texas of a water supply under an interstate compact apportioning the waters of an interstate stream – is a fundamental sovereign interest this Court has repeatedly recognized as sufficiently serious and dignified to support exercise of the Court's original jurisdiction. The interstate nature of the dispute requires that all signatory states be brought before this Court, which alone has exclusive and original jurisdiction over interstate disputes. No alternative forum exists which has jurisdiction over the three signatory states to the Rio Grande Compact and in which complete relief can be afforded regarding Texas' claims. Absent relief in this Court, EPCWID irrigators and municipal users in western Texas will continue to suffer deprivation of the water supply to which they are entitled to the great detriment of the economy of western Texas and the well-being and livelihoods of its inhabitants.

INTEREST OF THE *AMICUS CURIAE*

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. Art. XVI, § 59. EPCWID provides water for irrigation and municipal uses (pursuant to contracts entered into, with the approval of the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID which are classified as irrigable. EPCWID provides, on average, over fifty per-cent of the annual water supply of the City of El Paso from EPCWID's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas, and allocated to EPCWID through the Rio Grande Project, for irrigation, crop production, and municipal uses. EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. EPCWID is one of the two Rio Grande Project beneficiaries in the United States below Elephant Butte Dam and above Fort Quitman, Texas; the other is EBID, serving southern New Mexico water users. *See El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (internal footnotes omitted) (stating EPCWID is a political subdivision of the State of

Texas, and EPCWID "is not only an arm of the State, but is fashioned to perform public service and duties of high importance to the welfare of the people of Texas").

The Rio Grande Project was authorized in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas, and pursuant to international treaty, to Mexico. Act of February 25, 1905, ch. 798, 33 Stat. 814 (extending the Reclamation Act of 1902, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico) ("Rio Grande Project Act"); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (1906). The Rio Grande Compact was designed to ensure that the Project remained viable by requiring New Mexico's Rio Grande Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become Project water to be allocated and delivered by the Bureau of Reclamation to the Project beneficiaries.

EPCWID's predecessor, the El Paso Valley Water Users' Association ("Association"), was created to facilitate the implementation of the Rio Grande Project in 1905, following Congressional authorization of the Project. The Association entered into contracts with the United States for repayment of construction costs associated with the Rio Grande Project, and for water supply. EPCWID was created

in 1917, through an election called by the El Paso County Commissioner's Court pursuant to Article XVI, Section 59(b) of the Texas Constitution, which provides for the creation of conservation and reclamation districts that "shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions." The United States entered into a contract dated December 29, 1917, with EPCWID and the Association, and, thereafter, the Association was dissolved. In 1920, EPCWID merged with the El Paso County Conservation and Reclamation District No. 2, with the merged district known as EPCWID.

EPCWID is authorized to enter into contracts with the United States, Tex. Water Code § 55.185, and provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project. EPCWID has a contract with EBID, approved by the United States, dated February 16, 1938, which provides in part that 67/155th of the Rio Grande Project water is to be distributed to EPCWID, and 88/155th to EBID. In 2007, EPCWID filed a lawsuit in the Western District of Texas against EBID and the Bureau of Reclamation, seeking to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation*

Dist., et al., No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested that the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement which included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method for the Bureau of Reclamation to allocate and deliver Project water released from Elephant Butte Dam. The United States currently delivers Project water to EBID, EPCWID, and Mexico in accordance with the 2008 Operating Agreement. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and interference with the operation of the Project by the United States has and will continue to have detrimental effects on the continued viability of the Rio Grande Project and on the 2008 Operating Agreement.

EPCWID's rights to water in the Rio Grande Project were adjudicated in a final decree in *In re: Adjudication of all Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex., October 30, 2006). The United States (through the Bureau of Reclamation) is a joint owner with EPCWID of the water rights adjudicated

in Texas to the United States and EPCWID. The Texas Commission on Environmental Quality, on March 7, 2007, issued a Certificate of Adjudication pursuant to the final decree, authorizing EPCWID and the United States to divert, and EPCWID to use, water distributed pursuant to the Rio Grande Project ("TECQ Decree") (reprinted in the Appendix to this brief). New Mexico's noncompliance with its obligations under the Rio Grande Compact negatively impact the ability of the United States and EPCWID to receive the benefit of the rights adjudicated to them by Texas in the TECQ Decree.

EPCWID is involved in two ongoing cases in New Mexico which relate to the water supply and operation of the Rio Grande Project. EPCWID is a named defendant in the suit brought by the State of New Mexico in the United States District Court in New Mexico wherein New Mexico has attempted to void the 2008 Operating Agreement, *New Mexico v. U.S. Bureau of Reclamation, et al.*, CIV-11-691-JB/ACT (D.N.M.), and is *amicus curiae* in the New Mexico general stream adjudication in New Mexico state court, *New Mexico ex rel. N.M. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M.). In both cases, New Mexico is attempting to undermine the Rio Grande Project and alter New Mexico's obligations under the Rio Grande Compact in the absence of Texas and Colorado. Neither case can resolve the multitude of issues relating to the Rio Grande Compact and the Rio Grande Project in the absence of the signatory states to the Compact.

EPCWID is the sole Texas governmental entity party to the 2008 Operating Agreement and joint holder of the water rights adjudicated by the decree to EPCWID and the United States for the Rio Grande waters obligated to Texas under the Rio Grande Compact. EPCWID and its constituents will be directly affected by the Court's interpretation of the rights and obligations of the parties to the Rio Grande Compact. Because of its direct and unique interest, EPCWID is acutely aware of the importance of the issues brought before this Court by Texas and the importance of resolving New Mexico's violations of the Rio Grande Compact in the only forum which can consider and resolve the full nature of the dispute.

SUMMARY OF ARGUMENT

EPCWID supports Texas' Motion for Leave to File Complaint. The Texas Complaint properly invokes the Court's original and exclusive jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a). The claims presented, for interpretation and enforcement of the Rio Grande Compact, are serious and dignified claims asserted in Texas' sovereign capacity and which only may be heard by this Court. This Court must resolve Texas' claims to ensure the continued operation of the Rio Grande Project by the Bureau of Reclamation consistent with federal law and contracts, upon which irrigators and other residents of Texas, supplied by EPCWID, have depended for close to a century to

secure their fair share of the waters of the Rio Grande. Because this Court has original and exclusive jurisdiction of disputes between states, there is no alternative forum in which Texas can bring its claims to interpret and enforce the Rio Grande Compact against New Mexico and Colorado.

ARGUMENT

The Texas Complaint alleges a controversy which warrants the exercise of this Court's original jurisdiction. The Court has original and exclusive jurisdiction over cases and controversies between two or more States. U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a). The original and exclusive jurisdiction of the Court "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). In determining whether to permit a complaining State to invoke the Court's original jurisdiction, the Court focuses on the "'seriousness and dignity of the claim,'" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)), and "the availability of an alternative forum in which the issue tendered can be resolved," *ibid.* This Court has rarely declined to exercise its original jurisdiction in interstate compact disputes or where competing rights to an interstate stream are at issue. *See Texas v. New Mexico,* 462 U.S. 554, 567-68 (1983). The claims of Texas regarding violations of the Rio Grande Compact fall squarely within the exclusive

jurisdiction of the Court. *See ibid*; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 185 U.S. 125 (1902). Texas' Complaint plainly satisfies both the requirement that the claims be serious and dignified and that there exists no alternative forum in which such claims can be heard.

I. The Texas Complaint Asserts Serious and Dignified Claims Which are Within this Court's Original and Exclusive Jurisdiction.

"The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983); *id.* at 567 (stating that this jurisdiction includes interstate compact disputes between signatory states). "[T]he Framers . . . thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon." *S. Carolina v. Regan*, 465 U.S. 367, 397 (1984); *see also* The Federalist, No. 80, p. 36 (A. Hamilton) (Scott ed., 1898) (discussing the Court's original jurisdiction, and stating, "Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control").

The Texas Complaint for interpretation and enforcement of the rights and obligations of signatories to the Rio Grande Compact presents a serious and dignified claim. The Complaint asserts that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface waters and the interception of surface water by pumping of waters hydrologically connected to the Rio Grande, which violations have depleted and continue to deplete Rio Grande waters obligated to the State of Texas and EPCWID. Complaint at ¶¶ 18-21. The depletion of surface and underground waters by New Mexico water users within the Rio Grande Project in New Mexico have impaired, and continue to impair, the water supply of the Project and the water available to EPCWID as the downstream Project beneficiary and the rights which Texas was assured under the Rio Grande Compact. *Ibid.* at ¶¶ 18-19. The United States set aside all of the unappropriated waters in the Rio Grande in 1906 and 1908 for purposes of the Rio Grande Project, without limitation. *Ibid.* at ¶ 7. EPCWID as a Project beneficiary is entitled to its share of the United States' reservation of the water supply for the Project. As a condition to its admission to the Union in 1912, New Mexico acknowledged and accepted the permanent retention by the United States of "all rights and powers for the carrying out of the provisions" of the Reclamation Act. Enabling Act, ch. 310, 36 Stat. 557, 559 (1910). In the Rio Grande Compact, New Mexico agreed, accepted and acknowledged the existence and operation of the Project and the water supply for the Project required by the Rio

Grande Compact. Texas' Complaint seeks to enforce those sovereign commitments. Absent such enforcement, EPCWID and its users will be deprived of a vital water supply supporting irrigation and municipal uses in western Texas.

The Rio Grande Project was authorized by the Rio Grande Project Act as a federal reclamation project. Under the terms of the Rio Grande Compact, New Mexico's delivery requirements into Elephant Butte Reservoir are for the benefit of the Project. The Rio Grande Compact was entered into and designed to protect Rio Grande Project water deliveries for Texas for the purpose of providing water supply for the Project and its beneficiaries, EBID in New Mexico and EPCWID in Texas, and Mexico pursuant to treaty. Once delivered, the water belongs to the Rio Grande Project and its beneficiaries and cannot, as New Mexico has allowed, be taken back below Elephant Butte Reservoir in New Mexico through surface water diversions and diversions of underground waters hydrologically connected to Project supply. New Mexico cannot now reach below its Rio Grande Compact delivery point and abscond with water allocated to Texas under the Rio Grande Compact and to the Project beneficiaries in New Mexico and Texas by allowing non-Project depletions of Project water supply in New Mexico. Only this Court can resolve the Rio Grande Compact violations which Texas alleges in its Complaint which relate to essential sovereign interests regarding water and the Compact obligations imposed on the States as sovereigns.

Texas' claims assert substantial sovereign interests over which the Court should exercise its exclusive and original jurisdiction. *See Montana v. Wyoming*, ___ U.S. ___, ___, 131 S. Ct. 1765, 1770 (2011) (exercising jurisdiction over a complaint alleging breach of an interstate river compact by, *inter alia*, subsurface water pumping and new irrigation systems); *Kansas v. Nebraska*, 527 U.S. 1020 (1999) (having asserted original jurisdiction, granting leave to file a motion to dismiss on the question of whether the Republican River Compact restricts a State's consumption of groundwater; motion subsequently denied, 530 U.S. 1272 (2000)); *Kansas v. Colorado*, 514 U.S. 673, 690-91 (1995) (considering exceptions to the report of the special master regarding groundwater pumping claims); *Nebraska v. Wyoming*, 515 U.S. 1, 15 (1995) (accepting the recommendation of the special master to permit Nebraska to amend its complaint and assert claims related to groundwater pumping). The Rio Grande Compact and disputes among Colorado, New Mexico, and Texas regarding the waters of the Rio Grande have been the subject of prior cases over which this Court has exercised its original jurisdiction. *See Texas v. Colorado*, 389 U.S. 1000 (1967); *Texas v. New Mexico*, 343 U.S. 932 (1952); *Texas v. New Mexico*, 296 U.S. 547 (1935). The claims Texas brings before this Court similarly allege a dispute among the states of Colorado, New Mexico, and Texas as to the correct interpretation of the Rio Grande Compact and violations of the Rio Grande Compact. The Court should exercise its original

jurisdiction and grant Texas leave to file its Complaint.

Texas also alleges that New Mexico has interfered with and has attempted to impermissibly assert jurisdiction over the operations of the Rio Grande Project in violation of the rights of Texas under the Rio Grande Compact and in violation of the Rio Grande Project Act. Complaint at ¶¶ 18, 20-21. The water supply of the Rio Grande Project is inextricably related to the waters guaranteed to Texas by the Rio Grande Compact. This Court must interpret and enforce the rights of the respective states in and to the waters apportioned by the Rio Grande Compact, including the exclusive right of the United States to operate the Project for the benefit of the Project beneficiaries. Through the Reclamation Act, Congress authorized the Bureau of Reclamation to operate the Project, and the Rio Grande Compact does not provide New Mexico an operational interest in or authority over the Project.

The Project is currently operated pursuant to the terms agreed to by EPCWID, EBID, and the United States in the 2008 Operating Agreement. The 2008 Operating Agreement defines and protects the rights of EPCWID and EBID to the Project water supply. New Mexico's actions and violations of the Rio Grande Compact as set forth in Texas' Complaint undermine the rights of the Project beneficiaries under the Rio Grande Project Act and 2008 Operating Agreement and impair the ability of the United States to perform its obligations to EPCWID under

the Rio Grande Project Act and the 2008 Operating Agreement.

The Operating Agreement assumes New Mexico's compliance with its Rio Grande Compact delivery obligations, as does the TECQ Decree entered by Texas in its adjudication of EPCWID's Project water supply. New Mexico's current actions, however, are in derogation of the requirements imposed on it by the Rio Grande Compact, its contract with Texas and Colorado to govern the use by the three sister States of the Rio Grande's waters. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("[A] compact when approved by Congress becomes a law of the United States, but a Compact is, after all, a contract.") (internal citations, quotation marks, and alterations omitted). The interpretation and enforcement of the Rio Grande Compact must take into account the operation of the Rio Grande Project pursuant to the 2008 Operating Agreement. "[T]he equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982). As described in Texas' Complaint, New Mexico's acts and conduct in failing to comply with its obligations under the Rio Grande Compact and the Rio Grande Project Act significantly impair the operation of the Rio Grande Project. Complaint at ¶¶ 24-25. In order to ensure the Rio Grande Project continues to operate as

it has for close to a century, supplying irrigators and other water users in New Mexico and Texas with their fair share of the supply of Rio Grande water, this Court must accept jurisdiction over Texas' Complaint and resolve the claims asserted therein.

II. There are No Alternative Forums in Which Texas Can Seek Relief with Regard to the Claims Asserted in its Complaint.

There are no alternative forums in which Texas' claims may be heard because this Court and only this Court has exclusive original jurisdiction. *See* The Federalist, No. 81, p. 445 (A. Hamilton) (Scott ed., 1898) ("In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."). Neither the Rio Grande Compact Commission nor either of the ongoing litigations in New Mexico can assert jurisdiction over the relevant parties or provide complete relief to the interstate dispute Texas brings to this Court.

A. The Rio Grande Compact Commission is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The Rio Grande Compact Commission has no authority to consider the claims stated in the Texas Complaint. The Rio Grande Compact limits the Compact Commission's authority to administering the Rio Grande Compact and to collecting and maintaining data related to the administration of the Rio

Grande Compact. Rio Grande Compact, Art. XII. In a suit to adjudicate rights under the Pecos River Compact, this Court stated that "we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Texas v. New Mexico*, 462 U.S. 554, 569-70 (1983). The same rationale applies here. Moreover, any action of the Compact Commission requires unanimous consent. Rio Grande Compact, Art. XII. As set forth in Texas' Complaint, the Compact Commissioners have reached an impasse with regard to underlying issues relating to Texas' alleged violations of the Rio Grande Compact by New Mexico. Complaint at ¶ 23.

B. Federal District Court is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The suit brought by New Mexico in the United States District Court for the District of New Mexico is not an effective forum that eliminates the need for the Court to consider Texas' claims. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) (rejecting the argument that a federal district court had jurisdiction over a boundary dispute between two states because Congress granted "'original and *exclusive* jurisdiction of all controversies between two or more States'" to the Supreme Court) (quoting 28 U.S.C. § 1251(a)). Neither Texas nor Colorado are parties to the New Mexico federal district court action. Nor could they be made parties. The federal district court in New

Mexico lacks jurisdiction over Texas or Colorado as sovereigns who have not subjected themselves to the jurisdiction of that court. The action New Mexico has brought in federal district court is simply an attempted end run around the exclusive jurisdiction of this Court. Perhaps New Mexico is concerned that its fate on the Rio Grande will be similar to that on the Pecos River where, in another original jurisdiction action, New Mexico was held liable for its upstream depletions that deprived Texas of its share of Pecos River Compact waters. *See Texas v. New Mexico*, 482 U.S. 124, 128-29, 131-32 (1936).

Any judgment entered by the federal district court in New Mexico, to the extent the issues in that case are related to the claims Texas has brought to this Court, would not be binding on Texas or Colorado with regard to their rights or obligations under the Rio Grande Compact. This is exactly why this Court has original and exclusive jurisdiction over disputes between states, in particular disputes involving interpretation and enforcement of interstate compacts. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992); *see also Maryland v. Louisiana*, 451 U.S. 725, 744 (1981) (concluding that a federal district court was an "inadequate forum" for dispute regarding state severance tax where the proceeding "necessarily would not include the [original action] plaintiff States"). Any judgment entered by the federal district court in New Mexico will not fully resolve the claims in the Texas Complaint and will not provide the certainty and protection to the water supply of

EPCWID necessary to provide the water to which its users are entitled.

C. The General Stream Adjudication in New Mexico State Court is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The ongoing general stream adjudication in New Mexico state court is not an alternative forum for Texas' claims. *See Maryland v. Louisiana*, 451 U.S. 725, 741 n.17 (1981) (noting that the plaintiff states could not be made parties to the state court litigation); *id.* at 744 (concluding an action in state court challenging a state severance tax was not a viable alternative to proceeding under the original jurisdiction of this Court because such a challenge "implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction"). This Court has never viewed its original and exclusive jurisdiction to be obviated by a state general stream adjudication vis-à-vis an interstate compact dispute. *See Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River in original jurisdiction action during pendency of general stream adjudications on Colorado tributaries, *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master, 2010 WL 4111634, *15 (Feb. 10, 2010) (Special Master found that intrastate remedies did not preclude Montana from enforcing its rights under

the Yellowstone Compact which "requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations"). Nor could such a forum be deemed to be an adequate forum for resolution of interstate stream disputes. A general stream adjudication determines individual claims to ownership of water within a stream system, *see Dugan v. Rank*, 372 U.S. 609, 618 (1963), not to resolution of disputes between states as to the apportionment of the waters of the stream pursuant to an interstate compact. The latter is a matter within the exclusive original jurisdiction of this Court. *See Texas v. New Mexico,* 462 U.S. 554, 567-68 (1983). Regardless, Texas is not a proper party to the state general stream adjudication and could not be joined to the adjudication because it has not consented to suit in that forum. Indeed, at the initial stages of the adjudication when EPCWID sought to intervene as a party to protect its rights in the Project, New Mexico objected to its intervention, claiming EPCWID owned no water rights. Although EPCWID has continued as *amicus curiae* in that proceeding, the proceeding cannot provide full relief. Furthermore, the state adjudication court is declining to provide full faith and credit to the TECQ Decree in derogation of the rights of EPCWID to its allocation of Rio Grande water supply. *Cf. Texas v. Florida*, 306 U.S. 398, 410 (1939) (holding the exercise of original jurisdiction proper to resolve claims by multiple states to tax the same estate). The state adjudication court cannot resolve the allegations of Texas that New

Mexico has violated its obligations to Texas under the Rio Grande Compact. The state court, federal district court, and the Rio Grande Compact Commission are not alternative forums in which Texas' Complaint may be heard.

CONCLUSION

Texas should be granted leave to file its Complaint. The Complaint asserts serious and dignified claims for which no alternative forum is available.

Respectfully submitted,

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March 2013

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

[SEAL]

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION NO. 23-5940

Names of Holders:
United States of America

El Paso County Water Improvement District No. 1

Address:
Bureau of Reclamation
505 Marquette NW, Suite 1313
Albuquerque, NM 87102-2162

294 Candelaria Street
El Paso, TX 79907

Priority Dates:
July 6, 1889 and January 1, 1918

Purpose:
Agricultural, Municipal, Industrial, Mining, and/or Recreational Uses

Counties:
El Paso and Hudspeth

Watercourse:
Rio Grande (above Ft. Quitman, Texas)

Watershed:
Rio Grande Basin

WHEREAS, in 1905, the United States enacted the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat. 814, authorizing the construction of storage facilities on the Rio Grande in the Territory of New Mexico for storage of water of the Rio Grande for irrigation of lands in New Mexico and Texas for the Rio Grande Reclamation Project;

WHEREAS, in 1905, the State of Texas enacted House Bill 588, 29th Legislature, Chapter 101 (as amended, now Section 11.052 of the Texas Water Code), which authorized the Secretary of the Interior to make all necessary examinations and surveys for, and to locate and construct reclamation works for irrigation purposes within the State of Texas, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act of 1902 (38 Stat. 388, now 43 U.S.C. § 371, *et seq.*) as to such lands, subject to all the provisions, limitations, charges, terms and conditions of the said Reclamation Act;

WHEREAS, Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.";

WHEREAS, in 1906, the United States entered into the Convention with Mexico for the Rio Grande providing for the equitable distribution of water of the Rio Grande for irrigation purposes (34 Stat. 2953).

The Convention also provides that the delivery of said amount of water to Mexico shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply furnished from said irrigation system to lands in the United States in the vicinity of El Paso, Texas, and in case of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to Mexico at the Acequia Madre shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States. Under Article IV of such Convention, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the Acequia Madre and Fort Quitman, Texas;

WHEREAS, in 1906 and 1908, pursuant to the Reclamation Act of 1902, the Reclamation Service notified the Territorial Irrigation Engineer for the Territory of New Mexico of reservations by the United States of Rio Grande water for the Rio Grande Reclamation Project in accordance with the laws of the Territory of New Mexico;

WHEREAS, in 1910, Congress approved an Act (36 Stat. 559) which enabled the people of New Mexico to form a constitution and state government and to be admitted to the Union on an equal footing with the original States. Section 2 of such Act provided in part, "that there be and are reserved to the United States, with full acquiescence of the State [New Mexico], all rights and powers for the carrying out of

the provisions by the United States of an Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands' approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto [43 U.S.C. § 371 *et seq.*], as to the same extent as if said State had remained a Territory";

WHEREAS, in 1911, the State of Texas adopted what is now Section 11.005, Texas Water Code, which provides as follows: "This chapter applies to the construction, maintenance, and operation of irrigation works constructed in this state under the federal reclamation act, as amended (43 U.S.C. Sec. 371 et. seq.), to the extent that this chapter is not inconsistent with the federal act or the regulations made under that act by the secretary of the interior.";

WHEREAS, the United States stores water in two reservoirs, Elephant Butte and Caballo, located in New Mexico, for use throughout the Rio Grange [sic] Reclamation Project and for delivery to Mexico. The United States releases water from such storage and supplements such released water with return flow to the Rio Grande and water in the Rio Grande from other sources, and diverts such water at a series of diversion dams on the Rio Grande in New Mexico and Texas;

WHEREAS, the United States purchased lands, canals and water rights in Texas for the construction

of the Rio Grande Reclamation Project, and such purchases included, without limitation, the Franklin Canal and the lands and water rights identified in the Loomis affidavits of 1889, later embodied in Certified Filing No. 123, using Reclamation funds which were subject to reimbursement to the United States by Rio Grande Reclamation Project water users;

WHEREAS, in 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Section 41.009, Texas Water Code), which constitutes statutory law of the United States and the States of Colorado, New Mexico, and Texas and by the terms of the Compact cannot be modified without the approval of all four parties to the Compact;

WHEREAS, the United States releases stored water from Elephant Butte and Caballo Reservoirs to supply water to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to land in New Mexico. A substantial amount of water diverted by these two diversion dams for use in New Mexico is returned to the Rio Grande for use downstream of the dams. The next downstream diversion dam is the Mesilla Diversion Dam, which is located in New Mexico but is used to divert water to both the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1. The

American Diversion Dam is the next diversion dam downstream on the Rio Grande. It is the first diversion dam in Texas, and divides water in the Rio Grande between Mexico and the United States. Water for Mexico is provided by the United States and delivered to Mexico at the International Diversion Dam, in the Rio Grande downstream of the American Diversion Dam. Water for the El Paso County Water Improvement District No. 1 is presently diverted by the United States into the American Canal at the American Diversion Dam, but for many years the United States diverted some of such water at the Riverside Diversion Dam, which is presently not functional but may be rebuilt in the future;

WHEREAS, approximately 2.3 miles downstream from the American Diversion Dam is the International Diversion Dam. The International Diversion Dam is used to provide and deliver 60,000 acre-feet of water per year to Mexico pursuant to the 1906 Convention, and is the only diversion location authorized by the 1906 Convention or any other treaty between the United States and Mexico for diversion of water from the Rio Grande upstream of Fort Quitman, Texas. The Riverside Diversion Dam is the last downstream diversion dam on the Rio Grande below Caballo Dam and upstream of Fort Quitman, Texas. The Riverside Diversion Dam is presently not functional but may be rebuilt in the future;

WHEREAS, the United States entered into a contract dated December 29, 1917, with the El Paso County Water Improvement District No. 1 and the El

Paso Valley Water Users' Association. Thereafter, the El Paso Valley Water Users' Association was dissolved;

WHEREAS, the El Paso County Water Improvement District No. 1 ("District") is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution, and is subject to Chapter 55 of the Texas Water Code and other provisions thereof. The District is authorized by statute to enter into contracts or other obligations with the United States (§ 55.185, Texas Water Code). By statute the District is required to " . . . distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract" (Section 55.364, Texas Water Code). The El Paso County Water Improvement District No. 1 includes 69,010 acres within its boundaries that are classified by the United States and the District as irrigable;

WHEREAS, in 1920, the El Paso County Water Improvement District No. 1 merged with the El Paso County Conservation and Reclamation District No. 2, with the merged districts thereafter known as the El Paso County Water Improvement District No. 1;

WHEREAS, in 1924, the United States entered into a contract (the "Warren Act Contract") with the Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), pursuant to the Warren Act of

1911 (43 U.S.C. §§ 523-525), and the parties amended such contract in 1951. HCCRD holds Texas Permit No. 236 as amended by Permit No. 236A. Such permit authorizes HCCRD to divert water from the Rio Grande at two grade control structures, located at latitude 31.413 degrees north 106.096 degrees west in El Paso County, Texas and at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas;

WHEREAS, in 1996, the United States conveyed to the El Paso County Water Improvement District No. 1 certain facilities and rights-of-way within the District's boundaries but reserved ownership of the American Canal, the American Canal Extension, and the American, International and Riverside Diversion Dams;

WHEREAS, pursuant to 43 U.S.C. § 521, which allows the Secretary of the Interior to authorize conversion of water used in the Rio Grande Reclamation Project from irrigation to other uses, the United States entered into contracts with the El Paso County Water Improvement District No. 1 and the City of El Paso in 1941, 1944, 1949, 1962, 1999, and 2001 for the supply of Rio Grande Reclamation Project irrigation water for municipal and industrial uses by the City. The United States, the El Paso County Water Improvement District No. 1, and the Lower Valley Water District entered into similar contracts in 1988 and 1999 pursuant to 43 U.S.C. § 521 as well;

WHEREAS, in 1991, the District applied for a permit and asserted in its application that without waiving any, and while still preserving all, of its legal and "equitable" rights under federal and state law, (including, without limitation, the Rio Grande Compact; the 1906 Water Convention, May 21, 1906, between the United States and Mexico; contracts between or among the El Paso County Water Improvement District No. 1 and other entities, including the United States and New Mexico or its agencies; the Reclamation Laws of the United States and those acquired in New Mexico by virtue of the reservation of water rights by the United States as provided by notices from the United States to the New Mexico Territorial Engineer in 1906 and 1908). The Texas Natural Resource Conservation Commission (the "Commission") recognized that the El Paso County Water Improvement District No. 1 had those rights to that portion of the facilities and water of the Rio Grande Reclamation Project and the Rio Grande and its tributaries which have been reserved for or appropriated by or for the benefit of the District and its predecessors and beneficial users or which otherwise have been provided to them by law, equity or contract;

WHEREAS, pursuant to such application, the Commission issued to the District Permit No. 5433;

WHEREAS, by final decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3291, In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort

Quitman, Texas) Segment of the Rio Grande Basin, dated October 30, 2006, rights were recognized authorizing the United States and the El Paso County Water Improvement District No. 1 to impound, divert, and use waters of the State of Texas as set forth below.

NOW, THEREFORE, this certificate to appropriate waters of the State of Texas in the Rio Grande Basin is issued to the United States of America and the El Paso County Water Improvement District No. 1, subject to the following terms and conditions:

1. IMPOUNDMENT AND USE

   a. Certificate Holder United States is authorized to impound 2,638,860 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico

   b. Certificate Holders United States and El Paso County Water Improvement District No. 1 are authorized to divert and Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year from the following sources:

      i. all rights which Certificate Holders acquired or perfected pursuant to Certified Filing No. 123;

      ii. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release

to the Elephant Butte irrigation District and the El Paso County Water Improvement District No. 1, plus any additional share of Project Water obtained by Certificate Holders, or either of them, through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Reclamation Project;

and

iii. any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande.

c. In addition to the water diverted pursuant to paragraph 1.b above, Certificate Holders are authorized to divert from the Rio Grande up to 234,022 acre-feet per year of measurable surface-water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande by the District or any other entity with whom the District has entered into legal contract for such water. "Effluent" as used in this Certificate of Adjudication means any and all water that reaches the bed of the Rio Grande from agricultural drains, sewage treatment plants, or storm water runoff.

d. in addition to the water diverted pursuant to paragraphs 1.b. and 1.c. above, Certificate Holders are authorized to divert from the Rio Grande an average of 1,899 acre-feet of

water per year, when averaged over any five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Diversion Dam.

e. Certificate Holders are authorized to use the bed and banks of the Rio Grande to transport the water which is the subject of this Certificate of Adjudication, and to operate and maintain diversion dams and works.

2. DIVERSION POINTS

a. Certificate Holders are authorized to divert all or any part of the water authorized for diversion in paragraphs 1.b and 1.c above at the following diversion points:

i. Mesilla Diversion Dam located on the Rio Grande in New Mexico;

ii. American Diversion Dam located on the Rio Grande at the point where Texas, Mexico, and New Mexico meet; and

iii. Riverside Diversion Dam located on the Rio Grande approximately 13.5 miles downstream of the American Diversion Dam;

at a combined maximum diversion rate of 1,355 cubic feet per second.

b. Certificate Holders are authorized to divert the water authorized for diversion in paragraph 1.d above, from the American Diversion Dam and the Riverside Diversion Dam at a combined maximum diversion rate of 10 cubic feet per second.

3. PURPOSE AND PLACE OF USE

Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use all of the water authorized herein for agricultural, municipal, industrial, mining, or recreational purposes and/or irrigation of a maximum of 69,010 acres of land within the District's boundaries and/or to sell any of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

4. SPECIAL CONDITIONS

a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.

b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water which the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.

c. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.

5. PRIORITY

a. The time priority for use of the water included in paragraphs 1.b. and 1.c., as referenced above, is July 6, 1889.

b. The time priority for use of the water included in paragraph 1.d., as referenced above, is January 1, 1918.

The locations of pertinent features related to this Certificate of Adjudication are shown on pages 1 through 18 of the Appendix to the Report of the Investigation of Water Rights in the Upper Rio Grande (above Fort Quitman) Segment of the Rio Grande Basin, Texas. Copies of such pages are located in the office of the Texas Commission on Environmental Quality, Austin, Texas.

This Certificate of Adjudication is issued subject to all terms, conditions and provisions in the Final Decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3291, In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin dated October 30, 2006, and supersedes all rights of Certificates Holders asserted in that cause.

This Certificate of Adjudication is issued subject to senior and superior water rights in the Rio Grande Basin.

This Certificate of Adjudication is issued subject to the rules of the Texas Commission on Environmental Quality and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code, to the extent that such rules and supervision are not inconsistent with the federal Reclamation Act (43 U.S.C. § 371, *et seq.*) or the regulations made under that Act by the Secretary of the Interior as provided in Section 11.005 of the Texas Water Code.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

/s/ Kathleen H. White — 3/7/07

Kathleen Hartnett White, Chairman — Date Issued

ATTEST:

/s/ LaDonna Castanuela

LaDonna Castanuela,
Chief Clerk

:CORD
AND
RIEFS

No. 220141 Original

Supreme Court, U.S.
FILED
MAR 11 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To File Bill Of Complaint

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

INTEREST OF *AMICUS CURIAE*[1]

The City of El Paso, Texas, with its population of almost 650,000, is the twenty-second most populous city in the United States. With its sister city, Cuidad Juárez, it is the second most populous metropolitan area on the United States-Mexico border and a center for international trade, with one of the nation's busiest free trade zones. It is home to Fort Bliss, one of the U.S. Army's largest military complexes. El Paso is also a regional education center, home of the University of Texas at El Paso and the Medical Center of the Americas, Paul L. Foster School of Medicine.

However, El Paso is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its continued growth and prosperity depend upon having an adequate water supply, made up of groundwater and Rio Grande Project surface water.

Although El Paso has historically relied upon both surface and underground water for its sources of supply, use of groundwater from the Hueco Bolson

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[1] Under Rule 37.4, the City of El Paso is not required to file a motion for leave, and is not subject to the Rule 37.6 requirement. However, the notice of intent to file this brief, required under Rule 37.2(a), was timely provided to counsel of record.

formation increased until El Paso's use reached almost 80,000 acre-feet in 1989.[2] This raised serious questions about the long-term ability of the aquifer to support this level of pumping, causing El Paso to undertake a water management strategy that seriously promotes water conservation (per capita use in El Paso has dropped from 200 gallons per capita per day (gpcd) in 1990 to the current level of 133 gpcd), maximizes use of surface water, and increases the use of reclaimed water.[3] Additionally, El Paso Water Utilities in cooperation with Fort Bliss has constructed, developed and operates the largest inland desalination plant in the world, capable of producing 27.5 million gallons per day of potable water from underground brackish water sources.[4] These proactive strategies have allowed El Paso to cut its reliance upon the Hueco Bolson by half and reduce demand to a level that the aquifer can sustain.

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[2] The Hueco Bolson is the underground water formation located in Texas and Mexico, underlying all but the westernmost portion of the City of El Paso. Distinct from the Hueco Bolson, the Mesilla Bolson is the underground water formation located primarily in New Mexico and Mexico, with only a small portion extending into the westernmost corner of the State of Texas. The Rio Grande, as well as the Rio Grande Project in New Mexico, overlie the Mesilla Bolson before entering Texas. A map showing both formations is available on the webpage identified in footnote 3.

[3] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://www.epwu.org/water/water_resources.html.

[4] *See* http://www.epwu.org/water/desal_info.html.

The availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project (Project). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 (EPCWID) that entitle it to approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Rio Grande Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies. This water supply is potentially available only during the seven-month irrigation season, which corresponds with the peak demands upon El Paso's municipal system.

El Paso's current water supply and treatment capability is roughly 130,000 acre-feet per year; actual demand on the system varies from about 115,000 acre-feet per year to 125,000 acre-feet per year. This is a conjunctive supply of both surface and groundwater. Surface water is used to the maximum extent available in order to conserve limited groundwater supplies, and can meet more than half of El Paso's annual demand. In years when surface water is limited, groundwater makes up the shortage, with El Paso's demands on the Hueco Bolson again approaching 80,000 acre-feet per year under extreme drought conditions.[5]

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[5] *See* Op. Cit.

The continued availability of surface water from the Rio Grande Project is critical to El Paso's future water supply capability, both in terms of meeting current and anticipated demands and in terms of avoiding placing additional demand on groundwater sources on which the City needs to be able to rely for long-term supply.

For this reason, actions by the State of New Mexico to increase demands on Project water in New Mexico, reducing water available to Texas users, and actions to institutionalize those increased New Mexico demands, are a cause of serious concern to El Paso and Texas. The State of Texas' Complaint, that New Mexico is violating the Rio Grande Compact by impairing delivery of Project water to Texas, presents these issues to the Court. Addressing these issues is a matter of critical importance to the almost 750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUMMARY OF ARGUMENT

Surface waters of the Rio Grande and the Rio Grande Project below Elephant Butte Reservoir are hydrologically connected to the Mesilla Bolson, the local underground water formation in New Mexico below Elephant Butte Reservoir. Lowering the level of underground water by pumping in New Mexico causes increased losses of surface water and diminished

deliveries of Project water to Texas. New Mexico law allows such depletions of surface water supplies by groundwater pumping, and New Mexico is currently taking steps to institutionalize and protect such groundwater pumping in New Mexico, regardless of the adverse impact that this pumping has on deliveries of water to Texas.

Texas' Complaint, arguing that the Rio Grande Compact incorporates and protects deliveries of Rio Grande Project water to Texas, presents an issue squarely within this Court's original jurisdiction. It is a reasonable and appropriate construction of the Compact that has been previously urged by the State of New Mexico. No other forum is available for the State of Texas' Complaint.

El Paso urges the Court to accept and adjudicate Texas' Complaint.

ARGUMENT

I. Background

A. Factual Background

The Rio Grande below Elephant Butte Reservoir (part of the Rio Grande Project, and located in New Mexico) is hydrologically connected to the underground water formation, the Mesilla Bolson, which underlies the irrigated acreage of the Project in New Mexico. Thus, when groundwater levels are high, the Rio Grande can be a "gaining stream," with groundwater discharges contributing to the surface water

system. Under such conditions, delivery losses of Project water are low, and drain water and return flows from irrigation are high, all contributing to downstream deliveries. Conversely, when groundwater levels are lower, as a result of pumping in New Mexico, the Rio Grande becomes a "losing stream," with surface water feeding the underground system and high losses in the delivery of Project water downstream.

Groundwater resources were thoroughly investigated as part of the Rio Grande Joint Investigation, which served as a basis for compact negotiations and was submitted to the President on December 23, 1937. *See* Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 170 (1974). El Paso understands that at that time the Rio Grande was a gaining stream with positive groundwater contributions. By 1983, when El Paso sought the right to drill wells in New Mexico for its own water supply, thousands of wells had been drilled in the Mesilla Bolson in New Mexico and up to 185,000 acre-feet of water per year was being withdrawn. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 387 (D.N.M. 1983). During the last 30 years, pumping in New Mexico has further increased, further diminishing underground water reserves, and resulting in greater losses from the Project and the Rio Grande to the groundwater system.

Against this backdrop, after years of litigation and years of complaining by the El Paso County Water Improvement District No. 1 (EPCWID) that

both the quality and quantity of deliveries of Project water were being harmed by excessive groundwater pumping in New Mexico, the U.S. Bureau of Reclamation (USBR), the Elephant Butte Irrigation District (EBID) in New Mexico, and EPCWID entered into the Rio Grande Project Operating Agreement (Operating Agreement) in 2008. One fundamental purpose of the Operating Agreement is to mitigate the adverse impact of groundwater pumping in New Mexico upon deliveries of Project water to Texas. As discussed below, irrigators in New Mexico who are unable to obtain a full water supply from their surface water rights are able to pump underground water to make up the shortage. In order to protect Project deliveries to EPCWID, the Operating Agreement effectively reduces the delivery of Project water to EBID by an amount needed to make up for the adverse impact of groundwater pumping on state-line deliveries of Project water to EPCWID. EBID irrigators can still make up any shortages by pumping additional groundwater and the impact of groundwater pumping on EPCWID deliveries is mitigated.

B. Legal Background

The hydrologic situation found in the Lower Rio Grande in New Mexico, with senior surface water rights being impacted by junior groundwater pumping, is not unique to the Rio Grande Project or the Lower Rio Grande. New Mexico courts have developed an equitable doctrine that allows irrigators, such as those within EBID who cannot obtain an

adequate supply of surface water, to pump groundwater to supplement their surface water rights. The *Templeton* doctrine, based upon *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 465 (N.M. 1958), addresses the situation where junior wells intercept groundwater that previously discharged to the surface, thereby depriving the senior surface water appropriator(s) of their water rights. As recently described by the New Mexico Supreme Court:

> To address this circumstance, the Court in *Templeton* fashioned an equitable remedy to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well. Through this well the senior surface water right owner can supplement existing surface supply, if any, by drawing upon the groundwater that originally fed the surface water supply.

Herrington v. State, 139 N.M. 368, 133 P.3d 358, 372 (N.M. 2012) (citations omitted). Rather than protecting senior surface water rights by limiting groundwater pumping in a hydrologically connected system, New Mexico authorizes *additional* pumping by the surface water right holder to protect himself against junior groundwater pumping. Numerous irrigators within EBID have followed this pattern, developing groundwater supplies to supplement declining surface water available from the Project. Whether these wells will ultimately be determined to be new appropriations or supplemental wells under the *Templeton*

doctrine has not yet been determined. The adverse impact on deliveries to Texas, however, is the same and violates the long-standing Rio Grande Compact agreed upon by Texas, New Mexico and Colorado.

At the same time that New Mexico is allowing its residents to access underground water via the *Templeton* doctrine and new non-supplemental wells, New Mexico is taking affirmative action to cut off the Project and USBR from groundwater resources below Elephant Butte Reservoir. In the ongoing water rights adjudication proceeding in New Mexico state district court,[6] the United States sought a determination that the sources of Rio Grande Project water include both surface water and hydrologically connected groundwater. The State of New Mexico and other New Mexico parties filed motions to dismiss the claim of the United States to hydrologically connected groundwater. Even though the United States argued that such groundwater, as well as seepage and return flows of Project water, had been historically available and was needed to make deliveries of Project water to Texas and Mexico, the State's motion to dismiss claims of the United States to groundwater as a source of water for the Project was granted and the claim of the United States dismissed.[7]

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[6] *See State v. Elephant Butte Irrigation District*, No. CV-96-888, 3rd Judicial District Court, Doña Ana County.

[7] *See* Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State v. Elephant Butte*

(Continued on following page)

Further, as noted by the State of Texas' Complaint, paragraph 20, New Mexico has initiated litigation against USBR, EPCWID and EBID to set aside the Rio Grande Project Operating Agreement. *State of New Mexico v. U.S. Bureau of Reclamation*, No. Civ. 11-691 JB/WDS (D.N.M. filed Aug. 8, 2011). If successful, this suit would remove the final impediment to New Mexico's apparent effort to make maximum use of hydrologically connected groundwater, regardless of the impact of such use on New Mexico's Rio Grande Compact obligations and deliveries of Project water to Texas.

Thus, it appears that New Mexico is taking steps to institutionalize its production of hydrologically connected groundwater from below Elephant Butte Reservoir within the Project in New Mexico, regardless of the impact that such groundwater production may have on New Mexico's Compact obligations and deliveries to Texas.

II. Argument and Authorities

That pumping of hydrologically connected groundwater can reduce state-line deliveries of surface water and cause violation of interstate surface water compacts, appropriate to invoke this Court's original jurisdiction, has been proven by New Mexico on the Pecos River. *See Texas v. New Mexico*, 462 U.S. 554,

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Irrigation Dist., No. CV-96-888, Stream System Issue SS-97-104, United States' Interest (Aug. 16, 2012).

557 (1983); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Kansas v. Nebraska*, No. 126, Original (alleging Nebraska's violation of the Republican River Compact by allowing proliferation and use of hydrologically connected groundwater wells); *Kansas v. Colorado*, 514 U.S. 673, 693-94 (1995) (holding that groundwater pumping in Colorado had violated the Arkansas River Compact). The same thing is happening now on the Rio Grande.

El Paso agrees with the State of Texas that this dispute centers on a fundamental difference in interpretation of the plain terms of the Rio Grande Compact, and the parties' intent in executing the Compact. *Brief in Support of Motion for Leave to File Complaint* at 21. There is no doubt that this Court's jurisdiction extends to a suit by one State to enforce its compact with another State or to declare rights under a compact. *Texas v. New Mexico*, 462 U.S. at 567; *Kansas v. Colorado*, 514 U.S. at 693-94.

Although New Mexico can be expected to argue that its responsibilities end under the Rio Grande Compact when water is delivered into Elephant Butte Reservoir, El Paso would point out that this has not always been New Mexico's position. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), when El Paso sought to produce and export groundwater from New Mexico for use in El Paso, New Mexico argued that the Rio Grande Compact apportioned the surface waters of the Rio Grande between the states of New

Mexico and Texas and controls the use of hydrologically related groundwater. *Id.* at 382. Further, New Mexico argued that the Rio Grande Project's division of water released from Elephant Butte Reservoir operated to apportion between Texas and New Mexico water not expressly apportioned by the Compact. *Id.* at 386. For these reasons, New Mexico asserted that El Paso could not take groundwater from New Mexico without violating the Rio Grande Compact.

The district court in *City of El Paso v. Reynolds* ruled against New Mexico's construction of the Rio Grande Compact, but its ruling does not detract from Texas' cause of action. In that case, New Mexico was arguing that the district court lacked jurisdiction because the case involved a Compact construction issue and Colorado, Texas and the United States were indispensable parties. *Id.* at 382. The district court, however, ruled that the Compact signatories were not indispensable parties and "[n]ot being parties to this action, they are not bound by the judgment herein." *Id.* Moreover, the court expressly stated:

> Contrary to defendants' contention, a decision that the compact does not apportion the river below Elephant Butte does not mean that New Mexico, having made its delivery, could undermine it by pumping down the surface flow of the river below the point of

> delivery. *This opinion does not address that issue at all.*

Id. at 386 (emphasis added). Thus, *City of El Paso v. Reynolds* shows that New Mexico has previously argued precisely the Compact construction suggested by Texas' Complaint and that the rejection of this argument by the district court presents no impediment to this Court hearing Texas' Complaint.

The two criteria identified by this Court for determining whether to grant Texas' Motion for Leave to File Complaint are fully satisfied. Enforcement of interstate water compacts is, perhaps unfortunately, becoming an increasingly frequent basis for exercising the Court's original jurisdiction. *See, e.g.*, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (Yellowstone River Compact); *Kansas v. Nebraska*, No. 126, Original (Republican River Compact); *Kansas v. Colorado*, No. 105, Original (Arkansas River Compact). No question exists that Texas' Complaint falls squarely within the description of disputes justifying the Court's exercise of its original jurisdiction.

Similarly, no question exists regarding the availability of an alternate forum for resolution of the dispute. The Rio Grande Compact, like the Pecos River Compact, requires unanimity of the commissioners from New Mexico, Colorado and Texas for action and has proven incapable of addressing the issues presented by Texas' Complaint. The parties are at an impasse. *See* Pl.'s App. 16-18 (Compact art. XII).

Therefore, it is not a viable forum, and the only meaningful recourse is to this Court. *Cf. Texas v. New Mexico*, 462 U.S. at 562.

Neither the adjudication of Lower Rio Grande water rights in the New Mexico district court, *State v. Elephant Butte Irrigation District*, *supra* nor New Mexico's federal court suit against USBR and the irrigation districts, *State of New Mexico v. U.S. Bureau of Reclamation*, *supra*, presents a viable forum for the State of Texas' Complaint. The State of Texas is not subject to the jurisdiction of a New Mexico state court. Neither Texas nor Colorado is subject to the jurisdiction of the federal district court hearing New Mexico's claim against USBR, and the case involves entirely different issues than those presented by Texas' Complaint.

CONCLUSION

Texas' Complaint presents issues of construction and enforcement of an interstate water compact that are squarely within this Court's original jurisdiction. The water supply implications of these issues are of critical importance to regional municipal, commercial and agricultural interests, as well as the United States' military interests. Opportunities for cooperative resolution have been exhausted. This Court should grant Texas' Motion for Leave to File Complaint to

allow presentation and adjudication of the issues presented.

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RECORD AND BRIEFS

No. 220141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To File Bill Of Complaint

BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION TO FILE COMPLAINT

INTEREST OF *AMICUS CURIAE* HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1[1]

The Hudspeth County Conservation and Reclamation District ("HCCRD"), a conservation and reclamation district of the State of Texas established under Article XVI, § 59, of the Texas Constitution, holds rights to Rio Grande Project Water. HCCRD provides that water to farmers within its jurisdiction in Hudspeth County, Texas, for irrigation use.

As a result of New Mexico's actions in violation of the Rio Grande Compact ("Compact") that are described and alleged in the State of Texas' Complaint and its Brief in Support of its Motion to File Complaint, HCCRD receives significantly less of the water to which it is entitled, and significantly less water than it would receive if not for such violations.

Accordingly, HCCRD has a significant interest in having the Court grant the Motion for Leave to File Complaint, so that the Court may address the dispute

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[1] This brief was not authored in whole or in part by counsel for any party, and no party, or parties' counsel, has made any monetary contribution intended to fund the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

presented, and so that New Mexico may be made to cease its violations of the Compact.

The purpose of this *amicus* brief is to explain the history and nature of HCCRD's interest in Rio Grande Project Water and how those interests are being affected by the diversions of water that are being allowed to occur by New Mexico in violation of the Compact.[2]

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[2] Under the rules of this Court, no motion for leave to file an *amicus curiae* brief is necessary if the brief is presented "on behalf of a city, county, town *or similar entity* when submitted by its authorized law officer." SUP. CT. R. 37.4 (emphasis added). As noted above, *amicus curiae* HCCRD is a conservation and reclamation district of the State of Texas, created under Article XVI, § 59 of the Texas Constitution. Such districts are "political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513-14 (2009); *El Paso County Water Improv. Dist. No. 1. v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *reformed in accordance with opin.*, 243 F.2d 927 (5th Cir. 1957); *Kirby Lake Development, Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 (Tex. 2010); *Willacy County Water Control & Improvement Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944). HCCRD is therefore covered under Rule 37.4. Moreover, because undersigned counsel is HCCRD's authorized law officer for the purpose of this case, no motion for leave (or consent) is necessary for HCCRD to file this *amicus curiae* brief. By letter from undersigned counsel, dated February 28, 2013, and sent by U.S. Mail and fax on that date, all counsel of record in this case received timely notice of HCCRD's intent to file this brief.

SUMMARY OF ARGUMENT

HCCRD is a political subdivision of the State of Texas located in Hudspeth County and responsible for providing water for irrigation to farmers within its jurisdiction. HCCRD receives water from the Project. It holds rights to divert water from the Rio Grande from within the Project based on a permit from the State of Texas, and has the right to receive Project Water based on its Warren Act Contract with the United States. These rights have been recognized in a judicial decree adjudicating the rights to water in the Upper Rio Grande in Texas. HCCRD's rights are being impaired by New Mexico's violations of the Compact.

HCCRD supports the Motion for Leave to File Complaint because the seriousness and dignity of Texas' claims warrants the exercise of the Court's original jurisdiction and because the State of Texas has no alternative forum to resolve the dispute presented.

ARGUMENT

I. HCCRD is a political subdivision of Texas containing 18,618 irrigable acres, authorized to enter into contracts with the United States, and required to distribute and apportion water acquired under such contracts.

The Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD") is a political subdivision

of the State of Texas, organized under Article XVI, Section 59 of the Texas Constitution, and subject to Chapter 55 of the Texas Water Code.[3]

HCCRD is authorized to enter into contracts or other obligations with the United States.[4] HCRRD is required by statute to "distribute and apportion all water acquired by [it] under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract."[5]

HCCRD includes 18,618 acres within its boundaries that are classified by the United States and HCCRD as irrigable. Hudspeth County is located immediately east and southeast of El Paso County and downstream (on the Rio Grande) from El Paso County and upstream from Fort Quitman.

II. The Rio Grande Project was established to resolve a dispute between the interests of Texas and New Mexico over the waters of the Rio Grande and provide for irrigation.

As described by State of Texas in its Brief in Support of Motion for Leave to File Complaint, the Twelfth National Irrigation Congress was held in El

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[3] TEX. WATER CODE ANN. §§ 55.001-55.805 (West 2002). Chapter 55 is the general statute governing water improvement districts in Texas. *See id.*, §§ 55.001(1); 55.021.

[4] *See id.* § 55.185.

[5] *Id.* § 55.364.

Paso in 1904 ("1904 Irrigation Congress") to resolve a dispute between the interests of Texas and New Mexico over the waters of the Rio Grande. The 1904 Irrigation Congress resulted in a recommendation for the construction, by the United States, of a federal dam and reservoir (that became the Elephant Butte Dam and Reservoir) to be operated by the United States Bureau of Reclamation ("Bureau of Reclamation").[6]

The 1904 Irrigation Congress' recommendations were implemented through the authorization of the Rio Grande Project.[7] In 1906, the United States contracted for the water developed by the Rio Grande Project with Elephant Butte Irrigation District ("EBID") in New Mexico and the El Paso County Water Improvement District No. 1 ("EPCWID") in Texas.

III. HCCRD entered into a Warren Act Contract for Rio Grande Project Water with the United States.

In 1911, Congress passed the Warren Act[8] to authorize the United States to contract for impounding, storing, and carriage of water, to cooperate in the

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[6] Brief in Support of Motion for Leave to File Complaint ("Brief in Support") at 6.

[7] Rio Grande Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814.

[8] 36 Stat. 925, 43 U.S.C. §§ 523-525 (2006).

construction and uses of reservoirs and canals under reclamation projects, and for other purposes.

In a letter to the Secretary of Interior written in November 1924, the Commissioner of the Bureau of Reclamation noted that:

> [HCCRD] contains an irrigable area of 20,014 acres located in the State of Texas just below the Rio Grande Federal irrigation project. The terminus of the Tornillo Main Canal of the Government project may be feasibly connected with the district canal to serve water to lands of the district. The United States will have available for disposal at the terminus of this canal certain water developed from the project, which water can be used for the irrigation of district lands. This water would be dumped into the river and lost to the project were it not utilized on lands in the Hudspeth District.[9]

The United States and the HCCRD entered into a Warren Act Contract, dated December 1, 1924, and amended in 1951 ("Warren Act Contract"), which provides for the use of Rio Grande Project Water by the HCCRD. The Warren Act Contract originally provided that "[t]he United States will deliver to [HCCRD] at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each

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[9] *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F.2d 425, 427 (5th Cir. 1954) ("*HCCRD v. Robbins*").

irrigation season as established on the Rio Grande project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir."[10] The 1951 amendments to the Warren Act Contract added language specifying that the United States could deliver seepage or drainage water from land irrigated within the EPCWID, via canal, to HCCRD.[11]

IV. The Rio Grande Compact was negotiated and approved to protect the Rio Grande Project.

As described by the State of Texas, the Rio Grande Compact ("Compact") was necessitated and negotiated as a result of increased water development in Colorado and New Mexico upstream of Elephant Butte Reservoir. The Compact was approved in 1938. The Compact protects the Rio Grande Project, its operations, and the allocations of water to the Rio Grande Project beneficiaries.[12]

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[10] *HCCRD v. Robbins*, 213 F.2d at 427-428.

[11] *Id.* at 428. The right of the United States as storer and carrier of Project Water is not exhausted when such water is used once, but that right extends to the capture and reuse of such water. *See State of Nebraska v. State of Wyoming*, 325 U.S. 589 n.11 (1945).

[12] Brief in Support at 10-11.

V. HCCRD receives water from the Rio Grande Project.

The United States releases stored Rio Grande Project Water from the Elephant Butte and Caballo reservoirs to supply water in New Mexico and in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to EBID in New Mexico. Mesilla Diversion Dam is located in New Mexico but is used to divert water to both EBID in New Mexico and to EPCWID in Texas. American Diversion Dam is the next diversion dam downstream on the Rio Grande. The United States diverts water from the Rio Grande into the American Canal at the American Diversion Dam for EPCWID, some of which is subsequently used by HCCRD pursuant to the Warren Act Contract.

VI. HCCRD holds rights to divert water from the Rio Grande from within the Rio Grande Project.

HCCRD (and the United States) have the right to divert up to 27,000 acre-feet ("AF") per year of water from the Rio Grande in El Paso County and Hudspeth Counties to irrigate land within the boundaries of HCCRD. This right is set forth in Permit No. 236A

issued by the State of Texas via the Texas Commission on Environmental Quality.[13]

TCEQ has adjudicated all claims of water rights in the Upper Rio Grande (the portion of the Rio Grande in and bordering Texas above Fort Quitman, Texas). HCCRD's right to divert and use 27,000 AF per year from the Rio Grande is recognized in the final determination issued by TCEQ in that adjudication, dated April 13, 2006 ("2006 TCEQ Final Determination"). That determination was thereafter judicially adopted by Final Decree of the District Court for the 327th Judicial District, El Paso County, Texas, dated October 30, 2006 ("2006 Judicial Decree"). It was later recognized and set forth in the Certificate of Adjudication No. 23-5944 issued by TCEQ to HCCRD and the United States, dated March 7, 2007 ("2007 Certificate of Adjudication").

VII. HCCRD has the right to receive Rio Grande Project Water based on the Warren Act Contract.

HCCRD is also authorized by TCEQ to use up to 151,902 AF per year of any water delivered by the United States at the terminus of the Tornillo Drain, Hudspeth Feeder Canal, and Tornillo Canal under its Warren Act Contract with the United States. This

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[13] The Texas Commission on Environmental Quality ("TCEQ") is the Texas state agency charged with administering rights to surface water in Texas.

water consists of Rio Grande Project Water in excess of the needs of users within EPCWID, and drainage and return flows from Project Water delivered to EPCWID and used by EPCWID customers.

HCCRD's and the United States' rights under the Warren Contract to deliver and use, respectively, up to 151,902 AF per year of water from the Rio Grande Project are recognized in the 2006 TCEQ Final Determination, the 2006 Judicial Decree, and the 2007 Certificate of Adjudication.

These excess and drainage waters are Rio Grande Project Water. "The seepage waters, as well as the waters delivered to the [HCCRD] by [United States Bureau of] Reclamation officials under the contract executed in 1924, [are] all developed waters of the Rio Grande Project made possible by that project and never received by [HCCRD] prior to the construction by the [United States] of the dams, reservoirs and irrigation works."[14]

VIII. HCCRD may use the bed and banks of the Rio Grande to convey Project Water.

As expressly set forth in the 2007 Certificate of Adjudication, HCCRD and the United States are expressly authorized to use the bed and banks of the Rio Grande to transport Rio Grande Project Water to be used by HCCRD and to maintain diversion

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[14] *HCCRD v. Robbins*, 213 F.2d at 428.

structures and works in the Rio Grande as necessary to divert such waters.

IX. New Mexico violates the Compact by allowing the diversion and interception of water which deplete Rio Grande waters obligated to Texas.

As detailed by the State of Texas in its Complaint, New Mexico has violated and continues to violate the Compact by allowing the diversion of surface waters and the interception of subsurface water by pumping of waters hydrologically connected to the Rio Grande, and that such violations have depleted and continue to deplete Rio Grande waters obligated to the State of Texas and EPCWID.[15] New Mexico's violations of the Compact and the resulting depletion of waters obligated to the State of Texas and EPCWID, result in the depletion and significant reduction of waters available to HCCRD.

The diversion and interception of water in New Mexico in violation of the Compact have impaired, and continue to impair, the water supply of the Project and the water available downstream and to which Texas was assured under the Rio Grande Compact.

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[15] Complaint, ¶¶ 18-21.

X. Only this Court can resolve the Compact violations that the State of Texas has alleged; no alternative forum exists.

HCCRD agrees with the State of Texas and *Amicus Curiae* EPCWID that only this Court can resolve the Compact violations that Texas alleges in its Complaint and which relate to essential sovereign interests regarding water and the Compact obligations imposed on the States as sovereigns. The interstate nature of this dispute requires that all signatory states be brought before this Court, which alone has exclusive and original jurisdiction over such disputes.

No alternative forum exists with jurisdiction over the signatory states to the Compact and where complete relief can be afforded regarding Texas' claims.

XI. The State of Texas brings to the Court a significant, serious and dignified dispute.

HCCRD agrees with the State of Texas and *Amicus Curiae* EPCWID that Texas brings to this Court a significant, serious, and dignified dispute regarding New Mexico's violations and misinterpretations of the Compact.

CONCLUSION

This Court should grant Plaintiff's Motion for Leave to File Complaint. State of Texas' Complaint

asserts serious and dignified claims for which no alternative forum is available.

Respectfully submitted,

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STATE OF TEXAS,

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On Motion For Leave To File A Bill Of Complaint

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF OPPOSING TEXAS' MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND SUPPORTING DEFENDANTS

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Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*

TREATISES AND OTHER AUTHORITIES

H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications* (1968) 16

Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2) 16, 19

Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948) 4, 15

S.E. Reynolds and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 Nat. Resources J. 201 (1974 No. 2) 17

Sup. Ct. R. 37.4 1

The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in opposition to the State of Texas' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint in *Texas v. New Mexico and Colorado*, Original, No. 141. Las Cruces is filing this *amicus curiae* brief pursuant to Sup. Ct. R. 37.4, bringing to the attention of the Court related municipal water supply issues unique to the City.[1]

INTEREST OF *AMICUS CURIAE*

Las Cruces is an incorporated municipality of the State of New Mexico. It is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s and today is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the United States and its population is expected to exceed 150,000 by 2050. The City's present water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin ("Lower Rio Grande").[2] Las Cruces had plans to diversify its

[1] New Mexico received timely notice of the City's intent to file an *amicus curiae* brief and consents. Colorado and Texas received less than ten days' notice, with Colorado consenting and Texas acknowledging receipt of notice and stating that consent was not required under the Rules.

[2] Lower Rio Grande as used in this brief refers to the Rio Grande Basin in New Mexico between Elephant Butte Reservoir and the New Mexico-Texas state line.

municipal water supply by acquiring renewable surface water rights presently used for irrigated agriculture and converting them to municipal use, but those plans are in jeopardy as set forth below.

The City is presently a party in two pending lawsuits in other forums relating to water rights and water supply issues in the Lower Rio Grande. One suit was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico and involves an adjudication of all interrelated water rights in the Lower Rio Grande. This adudication will define and quantify the United States' water rights in the Rio Grande Project. *See infra* at 5-7. Las Cruces is an indispensable party to that suit.

The second suit involves the allocation of the Rio Grande Project surface water between Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EP No. 1") through an Operating Agreement signed by those two irrigation districts and the United States Bureau of Reclamation ("BOR") in 2008. *See infra* at 7-8. The City is a party to that case because the allocation of the Rio Grande Project surface water between EBID and EP No. 1 results in greater groundwater pumping in New Mexico, adversely affecting the City's groundwater rights and its plan to expand its water rights portfolio to include renewable surface water.

Texas' complaint would replace decades of ongoing litigation essential to protection of the City's water rights with an original action in which the City's ability to intervene is discretionary. The City is

entirely dependent on water rights that Texas seeks to curtail.

BACKGROUND

1. Rio Grande Project.

The Rio Grande Project consists of two irrigation districts. EBID contains 90,640 irrigated acres located in New Mexico and EP No. 1 consists of 69,010 acres located in Texas. Both irrigation districts are supplied with surface water released from Elephant Butte Reservoir. Historically, the Rio Grande Project surface water available to the districts has been divided 57% to EBID and 43% to EP No. 1 based upon their respective amounts of irrigated acres.

The surface water rights for the Rio Grande Project were acquired under New Mexico law pursuant to the Reclamation Act. *See* Reclamation Act of 1902, § 2, 32 Stat. 390. Pursuant to New Mexico Territorial law, the United States filed notices of intent in 1906 and 1908, the effect of which were to reserve from the then-unappropriated waters of the Rio Grande sufficient surface water for the Rio Grande Project which was planned for 730,000 acre-feet per year of native flows and to store up to 2,000,000 acre-feet in Elephant Butte Reservoir. *See* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. Because the Rio Grande Project water rights were acquired under New Mexico law, they are adjudicated and administered under New Mexico law.

2. Rio Grande Compact.

The Rio Grande Compact was entered in 1938 to apportion the waters of the Rio Grande among the states of New Mexico, Colorado, and Texas. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). Several articles of the Rio Grande Compact are pertinent to Texas' motion for leave to file complaint and Las Cruces' *amicus curiae* response.

Article III of the Rio Grande Compact contains Colorado's delivery obligation to New Mexico. Colorado's obligation is to "deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year . . . " according to the schedule set forth in Article III. *Id.*

Article IV describes New Mexico's delivery obligation. That obligation is to "deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September . . . " in the "quantity set forth in the following tabulation of relationship . . .." *Id.* The location of New Mexico's delivery obligation was changed by resolution of the Rio Grande Compact Commission in 1948 to provide for delivery of water directly into Elephant Butte Reservoir. *See* Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948).

The delivery obligations at Lobatos and Elephant Butte Reservoir are undertaken on an inflow/outflow

basis according to measurements taken at various stream gauges with the Rio Grande Compact quantifying the inflow into the lower gauge based upon the outflow of the upper gauge. This established allowable depletions within river segments that vary with the river flows.

Article XI of the Rio Grande Compact states that "upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled . . .." *See* Rio Grande Compact. It goes on to provide that the states have the right of recourse to the Court "should the character or quality of the water, at the point of delivery, be changed . . .." *Id.*

Accordingly, the Rio Grande Compact resolved all issues of allocations of the Rio Grande among the three states and the only right to seek recourse of the Court was if the quantity or quality of water changed "at the point of delivery" as described in Articles III and IV. *Id.*

No article of the Rio Grande Compact allocates water between EBID and EP No. 1 below Elephant Butte Reservoir. No article of the Rio Grande Compact requires New Mexico to deliver water to the New Mexico-Texas state line.

3. Lower Rio Grande Adjudication.

A general stream system adjudication of the Lower Rio Grande was filed by New Mexico in 1996

and continues today. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed September 24, 1996). A general stream system adjudication is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012). The adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The United States was joined to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. The United States litigated against its waiver of sovereign immunity and joinder to the state court adjudication for several years. The issue was finally resolved against the United States in *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993).

The nature, extent, and priority of the Rio Grande Project water rights are not defined, but will be resolved in the Lower Rio Grande adjudication. The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the adjudication

and EP No. 1 has been an active *amicus curiae*, filing briefs and presenting oral arguments.

4. Operating Agreement Litigation.

In 2008, an Operating Agreement was negotiated among EBID, EP No. 1, and the BOR to govern the Rio Grande Project surface water releases from Elephant Butte Reservoir.[3] After the Operating Agreement became public, hydrologic analyses by New Mexico revealed that the effect of the Operating Agreement was to alter the historical releases of the Rio Grande Project surface water from Elephant Butte Reservoir which had been made 57% to EBID and 43% to EP No. 1 to a new ratio, possibly as low as 38% to EBID and 62% to EP No. 1. The consequence is to significantly increase groundwater pumping in New Mexico, thus decreasing groundwater in storage where the City's groundwater rights are situated. Instead of conducting an Environmental Impact Statement ("EIS") over the 50-year period of the Operating Agreement to understand the hydrological impacts, the BOR undertook a cursory analysis over a three-year period that excluded an analysis of the hydrologic impact on the aquifer, resulting in an Environmental Assessment and a Finding of No Significant Impact.

On August 8, 2011, New Mexico filed suit in federal district court in New Mexico to invalidate the

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[3] The division of the Rio Grande Project surface water in the Operating Agreement was not perceived as a Rio Grande Compact matter by EBID, EP No. 1, or the BOR, or it could not have been negotiated without the states.

Operating Agreement in *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011). The City intervened to seek to require the BOR to conduct an EIS over the 50-year life of the Operating Agreement to identify the impacts of increased groundwater diversions resulting from the Operating Agreement on groundwater in storage in the aquifer, including any adverse impacts on the City's groundwater rights.

SUMMARY OF ARGUMENT

Texas' putative complaint asserts violations of the Rio Grande Compact based on New Mexico's alleged failure to protect Rio Grande Project surface water supply by allowing diversions of surface water and groundwater below Elephant Butte Reservoir beyond 1938 conditions. Contrary to the express language in the Rio Grande Compact, Texas contends that New Mexico has a delivery obligation at the New Mexico-Texas state line that has been violated.

The Court exercises its original jurisdiction sparingly and has declined jurisdiction when there are alternative forums available in which to settle the same issues. *See, e.g., United States v. Nevada*, 412 U.S. 534 (1973). Further, where a state has sought to file an original action *parens patriae* but the real parties-in-interest are already litigating the same issues in another forum, the Court has declined to

exercise its jurisdiction. *See Arizona v. New Mexico*, 425 U.S. 794 (1976). That is the circumstance here. *See infra* at Point I.

Texas has posited an interpretation of the Rio Grande Compact that has been squarely rejected by numerous courts and commentators for decades. According to the overwhelming authority, New Mexico's delivery obligation under the Rio Grande Compact is at Elephant Butte Reservoir, not the New Mexico-Texas state line. Once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The relief that Texas seeks, *viz.*, state line deliveries, would result in modification, not enforcement, of the Rio Grande Compact to the exclusion of Las Cruces' interests. An interstate compact cannot be modified without the consent of the participating states and Congress. *See infra* at Point II.

In addition to ignoring the express language of the Rio Grande Compact, Texas ignores alternative forums where pending litigation will resolve the issues it requests the Court to hear. In the Lower Rio Grande adjudication, the state district court is determining the nature and extent of the Rio Grande Project water supply. In federal district court, several parties are litigating the nature and extent of an Operating Agreement that allocates the Rio Grande Project surface water between EBID and EP No. 1. These are the appropriate forums to resolve the Rio Grande Project surface water supply issues relating

to allocations of Project water below Elephant Butte Reservoir. *See infra* at Point III.

Because the Rio Grande Compact does not contain a state line delivery obligation, an original action to "enforce" the Compact would, in reality, have the Court wade into a quantification of the Rio Grande Project water supply, something presently being accomplished in the Lower Rio Grande adjudication, analyze and resolve the Rio Grande Project surface water allocation issues between EBID and EP No. 1, matters presently pending in federal district court, and create a new apportionment of the Rio Grande below Elephant Butte Reservoir contrary to the express terms of the Compact and to the exclusion of Las Cruces' interests.

ARGUMENT

POINT I

The Original Jurisdiction of the Court is Invoked Sparingly.

Texas argues that there are two factors that the Court examines in deciding whether to grant a motion for leave to file a complaint in an original action – the nature of the interest of the complaining state with a focus on the seriousness and dignity of the claim, and the availability of an alternative forum in which the issues tendered can be resolved. *See* Texas' Brief in Support of Motion for Leave to File Complaint at 18-19 ("Texas' Brief").

While the jurisdiction of the Court extends to interstate suits under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1251(a), that jurisdiction is exercised sparingly. The Court has deferred to alternative forums where the issues can be decided. The Court declined jurisdiction in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972), stating that:

> [w]e construe 28 U.S.C. §1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

In *United States v. Nevada*, *supra*, the United States sought an original action declaring the rights of California and Nevada to the Truckee River and federal reserved rights for Pyramid Lake for which the United States claimed a prior right on behalf of the Paiute Tribe. The Court found the petition to concern a dispute between the United States and the two states over which the Court had original, but not exclusive, jurisdiction and that there was a pending case in Nevada with jurisdiction over the interested

parties. The Court declined jurisdiction, confirming: "[w]e seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *See United States v. Nevada*, 412 U.S. at 538.

Deference to alternative forums has also been applied within the Court's exclusive original jurisdiction. In *Arizona v. New Mexico*, *supra*, Arizona sought to file an original action challenging New Mexico's energy tax in both its propriety capacity and as *parens patriae*. Noting that the three Arizona utilities affected by the tax had filed suit in state court to hold the tax unconstitutional, the Court held: "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." *See Arizona v. New Mexico*, 425 U.S. at 797 (emphasis in original); *see generally Maryland v. Louisiana*, 451 U.S. 725, 739-45 (1981).

Arizona v. New Mexico is significant in relation to Texas' motion for leave to file because the Court looked behind Arizona's allegation that it was appearing *parens patriae* to the underlying interests consisting of the three utility companies. The Court found that the existing state court proceeding provided an alternative forum where the "issues" could be determined among the real parties-in-interest irrespective of the fact that Arizona had attempted to create an original action. *See Arizona v. New Mexico*, 425 U.S. at 797.

The same logic applies here. EP No. 1 and the City of El Paso are the real and only parties-in-interest in Texas. There are two pending lawsuits, *viz.*, alternative forums, in which one or both entities are parties to the identical issues that Texas seeks to have the Court resolve in this original action. One lawsuit is a district court proceeding in New Mexico adjudicating rights to the Rio Grande Project, among others, and the other is a federal district court proceeding related to the 2008 Operating Agreement which allocates the Rio Grande Project surface water between the two irrigation districts. The issues tendered by Texas in this putative original action are issues that should be resolved in alternative forums through pending litigation. *See infra* at Point III. As it did in *Arizona v. New Mexico*, the Court should look behind Texas' allegation that it is appearing *parens patriae* to the underlying interests of EP No. 1 and the City of El Paso, decline to exercise its original jurisdiction, and allow the same issues to be resolved in alternative forums.

POINT II

Texas has not pled a Cause of Action for Enforcement of the Rio Grande Compact.

Texas has failed to plead a justiciable cause of action for enforcement of the Rio Grande Compact within the Court's original jurisdiction for two reasons. First, Texas misconstrues the Rio Grande Compact to require a delivery obligation at the New Mexico-Texas

state line where none exists and then alleges violations of that supposed obligation by New Mexico. Second, what Texas actually seeks is a modification of the Rio Grande Compact, a remedy which the Court cannot provide.

A. Texas has not pled a Violation of the Rio Grande Compact.

Texas' putative complaint alleges violations of the Rio Grande Compact. *See* Texas' Brief at 1. Contrary to its express terms, Texas alleges that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface water and groundwater between Elephant Butte Reservoir and the New Mexico-Texas state line beyond 1938 conditions. *See* Texas' Complaint at ¶¶4, 10, 11, 18, and 19. Texas improperly transforms the allocation of the Rio Grande Project surface water below Elephant Butte Reservoir into a Compact delivery obligation.

Nothing in the Rio Grande Compact quantifies the Rio Grande Project water supply or makes protection of that water New Mexico's obligation under the Compact. Instead, the Rio Grande Project water supply released from Elephant Butte Reservoir must be quantified and administered under New Mexico state law where the Rio Grande Project water rights emanate. Issues relating to the allocation of the Rio Grande Project surface water between EBID and EP No. 1 are not subject to the jurisdiction of the Court

because they are not obligations in an interstate compact. *See infra* at Point III.

Texas' proposition that New Mexico is required by Compact to deliver the Rio Grande Project surface water to EP No. 1 creates a fictional state line delivery obligation by New Mexico. This is contrary to the express terms of the Compact. New Mexico's delivery obligation is set forth in Article IV of the Rio Grande Compact and requires delivery of Rio Grande flows into Elephant Butte Reservoir, not at the state line. *See* Rio Grande Compact and Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948).

An overwhelming number of cases, treatises, and law review articles agree that New Mexico's delivery obligation under the Rio Grande Compact ends at Elephant Butte Reservoir and that there is no state line delivery obligation. In *City of El Paso v. Reynolds*, the federal district court held that "New Mexico is obligated to make delivery not at the New Mexico-Texas state line but 'into Elephant Butte Reservoir.'" *See City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984). The court further observed that neither the history of the Compact negotiations nor the ultimate terms of the Compact "support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and

Texas." *Id.* Moreover, the district court held that the Compact "did not apportion any specified amount of water to Texas below Elephant Butte." *Id.* at 385.

An identical holding was reached by the New Mexico Court of Appeals when it held that the "Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line." *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d at 378. Similarly, a federal district court in Texas agreed, stating that the Rio Grande Compact:

> [h]as a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam . . ..

See El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907 (W.D. Tex. 1955), *aff'd*, 243 F.2d 927 (5th Cir. 1957), *cert. den.*, 355 U.S. 820 (1957). *See also Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 996 (10th Cir. 2002); H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications*, at 272-291 (1968); Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2);

and S.E. Reynolds and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 Nat. Resources J. 201 (1974 No. 2). Many more citations exist.

More telling, in invoking the Court's original jurisdiction in *Texas v. New Mexico*, No. 9, Original, in the Court's October Term, 1952, Texas pled that New Mexico's delivery obligation was into Elephant Butte Reservoir. That case involved allegations that New Mexico had violated the storage provisions of the Compact related to El Vado Reservoir upstream of Elephant Butte. Texas pled: "[t]he supply of water *required by the Compact to be delivered by New Mexico into Elephant Butte Reservoir* for the benefit of the State of Texas has been seriously diminished as a result of these violations . . .." *See* Texas' Complaint, *Texas v. New Mexico*, No. 9, Original at ¶ VII (emphasis added).

As set forth in Article XI of the Rio Grande Compact, all controversies related to the allocation of waters among the states were resolved in the Compact. Recourse to the Court was allowed should the quantity or quality of water change at the "point of delivery." The only points of delivery set forth in the Rio Grande Compact are described in Articles III and IV. Texas makes no allegations of shortfalls into Elephant Butte Reservoir under Article IV of the Compact. Instead, Texas seeks recourse for water deliveries not mentioned anywhere in the Rio Grande Compact.

As the Court stated in *Texas v. New Mexico*, *supra*, once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. at 564; *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *compare Arizona v. California*, 373 U.S. 546, 565-66 (1963). In this case, Texas is seeking relief inconsistent with the express terms of the Rio Grande Compact.

B. Texas seeks to Modify, not Enforce, the Rio Grande Compact.

Because the Rio Grande Compact is explicit that New Mexico's delivery obligation is into Elephant Butte Reservoir, the relief that Texas seeks would result in modification, not enforcement, of the Rio Grande Compact. Such relief is beyond the Court's jurisdiction as the Court can only order relief consistent with the Compact's express terms. *See Texas v. New Mexico*, 462 U.S. at 564.

The process for negotiating an interstate compact is set forth in Article I, § 10 of the United States Constitution. Congress must consent to the negotiation of an interstate compact and appoint a federal representative to safeguard the United States' interest. Upon the completion of negotiations, the compact must be ratified by each of the state legislatures and Congress. Accordingly, it becomes both a state and federal law. This process was exemplified in the negotiation and ratification of the Rio Grande

Compact in 1938 and it would be required if the Rio Grande Compact were to be modified today as requested by Texas. When enacted, an interstate compact "constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties." *See C. T. Hellmuth & Assoc. v. Washington Metro. Area Trans. Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976).

Texas' claim that New Mexico has a state line delivery obligation under the Rio Grande Compact has significant ramifications. As stated by the Commissioner negotiating the Compact for New Mexico, "for the purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." *See* Hill, *supra*, at 172. Only New Mexico's equities above Elephant Butte Reservoir were considered and evaluated in determining New Mexico's allocation of water under the Rio Grande Compact. New Mexico's equities below Elephant Butte Reservoir were not considered. Had New Mexico's delivery point under the Rio Grande Compact been at the state line instead of into Elephant Butte Reservoir, equities south of Elephant Butte Reservoir, principally Las Cruces' interests as the state's second largest city, would have to have been included in determining New Mexico's allocation of Rio Grande water. The fictional compact which Texas seeks to enforce makes the absurd assumption that New Mexico approved a compact which limited water rights below Elephant Butte Reservoir to those of the Rio Grande Project with the full understanding

that this meant there could be no groundwater diversions by Las Cruces. New Mexico never would have ratified such a compact intentionally excluding Las Cruces' interests.

POINT III

There is pending Litigation Providing Alternative Forums for the Issues Raised by Texas.

Texas' putative complaint is incorrectly based on the premise that there is an interstate cause of action among Texas, New Mexico, and Colorado predicated on violations of the Rio Grande Compact in the Lower Rio Grande. To the contrary, the Lower Rio Grande presents issues requiring a determination of the United States' interest in the Rio Grande Project. Those issues are presently being litigated by the real parties-in-interest in alternative forums in the Lower Rio Grande adjudication in New Mexico and in the federal district court where the Operating Agreement is at issue.

A. The Lower Rio Grande Adjudication is the only Forum to Determine Rights to the Rio Grande Project.

The first alternative forum is the Lower Rio Grande adjudication. *See supra*, at 5-7. Texas' effort to remove adjudication issues from the adjudication court to the United States Supreme Court would deny due process to all other claimants for the following

reasons. First, the issue of the Rio Grande Project rights is necessary in the state court adjudication in order to finally resolve claims with respect to the Rio Grande Project, both for the United States and *inter se* with respect to the other claimants. Second, the Court cannot undertake an adjudication involving thousands of defendants in New Mexico under its original jurisdiction. Third, the Court does not administer adjudication decrees.

The United States has been joined to the adjudication pursuant to the terms of the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d at 378. Texas has equated its claimed Compact interest with that of the United States' Rio Grande Project interest:

> The United States, in 1906 and again in 1908, as part of the planning and implementation of the Rio Grande Project, set aside all of the unappropriated waters of the Rio Grande that were necessary for the operation of the Rio Grande Project. Notice of Water Appropriation and Supplemental Notice of Water Appropriation, *supra*. The Rio Grande Compact succeeded to these water rights.

See Texas' Brief at 15.

The United States' rights are exercised in relation to those of other parties, including those of the City. Texas cannot be allowed to remove the United States'

Rio Grande Project interest for a separate adjudication in the Court to the prejudice of the City and other interests which are interconnected.

New Mexico spent $3,000,000 on a hydrographic survey to identify the water rights claims on the Lower Rio Grande. There are 18,000 defendants claiming rights to the surface and groundwater of the Lower Rio Grande, with 14,000 active subfiles, and more than 5,000 subfile orders have been entered. It is not feasible for the Court to remove the adjudication, or one part of it, into its original jurisdiction.

An adjudication is an inherently *inter se* proceeding. The rights adjudicated to one party affect those adjudicated to another. For this reason, the New Mexico adjudication process is divided into two phases. In the first phase, the state appears as the nominal plaintiff against the water users or claimants as the nominal defendants. The adjudication is not complete until a second phase has been held in which the individual claimants are entitled to contest the rights adjudicated to other defendants. *See State ex rel. Reynolds v. Sharp*, 344 P.2d 943, 66 N.M. 192 (1959); *State ex rel. Reynolds v. Allman*, 427 P.2d 886, 78 N.M. 1 (1967).

Stream System Issue No. 104 is addressing "stream system issues," in which the extent of the United States' rights in the Rio Grande Project for EBID and EP No. 1 will be determined. These include whether or not there is a right to groundwater,

priority date, amount of water, and purpose of use of water stored in Elephant Butte Reservoir. The two Texas parties with an interest in the adjudication in New Mexico, the City of El Paso and EP No. 1, are present. The designation of "stream system issues" by the adjudication court is intended to address issues which "would, as a practical matter, be dispositive of the interests of other claimants," or "substantially impair or impede the ability of claimants or the State to protect their interests . . .." *See* First Amended Case Management Order of September 14, 2009, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed September 24, 1996). Removing Rio Grande Project issues now cannot be done without substantially impairing or impeding the ability of Las Cruces to protect its interest.

B. State Administration is Required for the Adjudication Decree.

The purpose of an adjudication is to provide a decree containing a full description of the water rights adjudged to each party. Following the entry of an adjudication decree, administration is then undertaken by the state court or the State Engineer. The Court has declined to undertake decree administration of the kind that would follow from granting Texas' motion. As the Court stated in *Texas v. New Mexico*, *supra*:

> [w]e have expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the States involved. *E.g.*, *Vermont v. New York*, 417 U.S. 270 (1974); *Wisconsin v. Illinois*, 289 U.S. 710, 711 (1933). Continuing supervision by this Court of water decrees would test the limits of proper judicial functions, and we have thought it wise not to undertake such a project. *Vermont v. New York*, *supra*, at 277.

Texas v. New Mexico, 462 U.S. at 566.

In 2012, the New Mexico State Engineer obtained the ability to undertake administration of water rights on the basis of documents on file in the State Engineer's Office, without waiting for the completion of an adjudication. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ___ P.3d ___. Accordingly, there is an alternative forum of administration for Texas' issues.

C. The Federal Operating Agreement Litigation is resolving Project Allocation Issues.

In *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011), the City, as an intervenor, seeks declaratory and injunctive relief to compel the BOR to complete an EIS covering the 50-year term of the Operating Agreement to analyze its adverse effects on groundwater in storage where Las Cruces diverts its

municipal water supply. *See* National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.*; 40 C.F.R. §§ 1508.25(a)(1) & (2), 1508.27(b)(7). The City also seeks to determine what remains of its plans to buy surface water rights from agricultural users and convert them into municipal rights.

Until an EIS is completed and the litigation resolved regarding the validity of the Operating Agreement, the allocation of the Rio Grande Project surface water between EBID and EP No. 1 remains unknown and therefore, Texas has no definitive allocation to protect or enforce. The proper forum for these issues is the federal district court in New Mexico. The issues in Texas' complaint are not ripe until this has been completed.

The Court has been hesitant to expand its original docket with cases involving the complexities of water quality issues. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). In *Wyandotte*, the Court eschewed any expertise in assessing the complicated scientific issues at stake, noting that it would have "to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum." *Id.* at 505. The same is true with preparing an EIS here.

CONCLUSION

For the foregoing reasons, Texas' motion for leave to file its complaint should be denied.

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RECORD
AND
BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave
To File Bill Of Complaint

COLORADO'S BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE COMPLAINT

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Río Grande Project Act of February 25, 1905,
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COMES NOW the State of Colorado by and through counsel and pursuant to Supreme Court Rule 17.5 and submits this [Brief in Opposition to the Motion for Leave to File Complaint] ("Motion") submitted by the State of Texas in this matter, No. 22O141, Original.

STATEMENT OF POSITION

The State of Colorado has been in compliance with its obligations under the Río Grande Compact for over forty years, and the State of Texas named the State of Colorado as a party to this action only because it is a signatory to the Río Grande Compact. Complaint, *Texas v. New Mexico and Colorado*, No. 22O141, Original (January 2013) at 3. Texas has not made any claim against Colorado for violation of the Río Grande Compact in its proposed complaint.

The State of Colorado does not take a position or respond to Texas' specific allegations. However, Colorado cannot determine whether and to what extent Texas' Brief in Support of Motion for Leave to File Complaint ("Brief") and Complaint raise an actual compact controversy for this Court to consider. It is Colorado's position that states should avoid litigation of compact issues whenever possible. Moreover, an original action in this Court that invokes the Río Grande Compact may indirectly impact Colorado interests. Accordingly, unless and until the state can better understand the particular compact matters at

issue, Colorado cannot support granting Texas' Motion.

ARGUMENT

Texas asks this Court to exercise its jurisdiction under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code to resolve claims that Texas asserts "arise from an interstate water compact." Motion at 2. To resolve disputes between and among sovereigns concerning compacts, this Court's original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citing *Virginia v. West Virginia*, 206 U.S. 290, 317-19 (1907)). In such cases, this Court's "first and last order of business is interpreting the compact." *Id.* at 567-68. *See also Oklahoma v. New Mexico*, 501 U.S. 221 (1991) (interpreting specific provisions of the Canadian River Compact). Accordingly, this Court looks to the terms of the compact to resolve the plaintiff state's claims. *See Kansas v. Colorado*, 514 U.S. 673, 682-83 (1995) (noting that whether Colorado had violated a specific provision of the Arkansas River Compact was the proper inquiry for the Court and not whether Colorado had violated the Bureau of Reclamation's operating principles for a reservoir in Colorado).

In the present action, Texas contends that a failure to comply with one or more of the obligations under the Río Grande Compact gives rise to its claims. Complaint at 14-15; Brief at 1, 3-4. However, neither the Complaint nor the Brief link specific compact provisions to actions that demonstrate violation of the Río Grande Compact.

In support of its allegations, Texas' Complaint and Brief describe various provisions of the Río Grande Compact and characterize the signatory states' obligations under those provisions. *See* Complaint at 2, 6-7; Brief at 2, 11, 12, 14 (describing the water delivery requirements under the Río Grande Compact); Brief at 12 (outlining the manner in which the Río Grande Compact addresses under- and over-deliveries); and Complaint at 7; Brief at 12, 13 (describing how the Río Grande Compact defines "usable water" stored in Río Grande Project reservoirs). Texas then sets forth, through its Complaint and Brief, allegations concerning the nature of water allocations through the Río Grande Project consistent with the Río Grande Project Act of February 25, 1905, ch. 789, 33 Stat. 814, the benefiting entities of the Río Grande Project, and New Mexico's interference with the operations of the Project to the detriment of those benefiting entities. Complaint at 2, 4; Brief at 2, 8, 16 (describing water ownership and allocation); Complaint at 4 (identifying beneficiaries); Complaint at 9, 10, 11, 12 (alleging actions by New Mexico impacting beneficiaries to Río Grande Project).

In setting forth this framework, Texas describes specific provisions in the Río Grande Compact used in determining the obligations of the signatory states with respect to waters upstream of and in Elephant Butte Reservoir, but fails to explain how such provisions apply to waters in the Río Grande Project Area *below* Elephant Butte Dam, which appear to be the waters affected by New Mexico's alleged actions. In fact, Texas acknowledges that such compact provisions do not address obligations with respect to waters in the Río Grande Project Area below Elephant Butte Reservoir. *See* Complaint at 5 (acknowledging that "[t]he Río Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation. Instead, it relied upon the Río Grande Project and its allocation and delivery of water in relation to the proportion of Río Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Río Grande waters between Río Grande Project beneficiaries in southern New Mexico and the State of Texas."). As a result, Colorado cannot discern from Texas' Complaint or Brief the specific interstate compact controversy that warrants this Court's attention and justifies this Court exercising its original jurisdiction.

CONCLUSION

For the reasons set forth above, Colorado takes no position regarding any of Texas' specific allegations against New Mexico. However, the generalities set forth in the Complaint and Brief make it impossible for Colorado to determine whether a compact controversy truly exists. Accordingly, unless and until the compact matters at issue can be clarified to demonstrate the justiciable issue worthy of this Court's attention, Colorado does not support Texas' Motion.

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STATE OF COLORADO,

Defendants.

On Motion For Leave To File Complaint

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STATEMENT

A. Summary of Argument

Texas seeks to invoke this Court's original jurisdiction, asserting that New Mexico has breached its "obligations and responsibilities under" the Rio Grande Compact ("Compact"), and that New Mexico is raising "novel" arguments in two pending cases to which Texas is not a party. Complaint at ¶¶ 19-21. Texas does not allege and cannot establish, however, that New Mexico has violated an express Compact term. Nor has Texas alleged that New Mexico has violated its obligation under the delivery requirement that the Compact imposes, i.e., to deliver an amount of water to Elephant Butte Reservoir.[1] There is no requirement under the Compact that New Mexico deliver a specified quantity of water to the New Mexico-Texas state line, a location about 105 miles downstream from Elephant Butte Dam. *See* App. A. In fact, Texas concedes that the Compact does not grant a specific quantity of water to Texas or require that New Mexico deliver a specific quantity of water

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[1] The Rio Grande Compact, Act of May 31, 1939, ch. 155, Art. IV, 53 Stat. 785, 788, identifies San Marcial as New Mexico's delivery point. In 1948, the Compact Commission changed that gaging/delivery point to Elephant Butte because changed physical conditions at the San Marcial gage rendered that gage unusable. *See* Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

to the New Mexico-Texas state line. Complaint at ¶ 10.

Recognizing that there is no violation of the express terms of the Compact, Texas alleges instead that New Mexico has violated the "purpose and intent" of the Compact by allowing and authorizing the interception and use of Rio Grande Project ("Project") water below Elephant Butte Reservoir and before arriving at the Texas-New Mexico state line. Complaint at ¶ 4. The Project is a federal reclamation project owned and operated by the United States. The United States has allocated all of the Project water pursuant to Reclamation law. The water is allocated by reclamation contracts to Project beneficiaries for uses in Texas and New Mexico.[2] The State of Texas does not have a contract for water from the Project. The Compact does not express a "purpose and intent" to protect a certain amount of Project water for delivery to the Texas-New Mexico state line, nor any provision prohibiting New Mexico from allowing its water users to make additional depletions between Elephant Butte and the Texas-New Mexico state line.

Texas' Motion for Leave should be denied. First, Texas' claims are not based on the express terms of the Compact and are not of the nature of a dispute between sovereign states. Second, there are alternative fora for resolution of the issues raised in Texas'

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[2] By Treaty, the United States also delivers an amount of Rio Grande water to Mexico, but that water is not at issue herein.

Complaint. Whether the United States' recent changes to operations of the Project violate various federal laws is currently being litigated in the Federal District Court. *See New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 1, 2013). The United States' claims to rights for the Project are before a New Mexico adjudication court pursuant to 43 U.S.C. § 666. *See New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. Third Judicial Dist. Ct. Aug. 16, 2012), https://lrg adjudication.nmcourts.gov/ (the "Lower Rio Grande Adjudication"). Should the parties in those cases succeed in their claims, Texas' issues will be vindicated. If they fail, this court may take up those issues in the ordinary course of judicial review. Original jurisdiction is a right to a special review, and is a delicate and grave matter only sparingly granted by this Court. Third, as was held in an earlier case raising claims under the Compact, the United States is an indispensable party and has not consented to joinder in this action. Each of these bases is independently sufficient to deny the motion for leave.[3]

---

[3] The Motion and Complaint are not submitted by the Texas Attorney General or any attorney specially commissioned by the Attorney General, or on behalf of the Governor. The pleadings appear to be filed on behalf of the Texas Commission on Environmental Quality and the Texas Rio Grande Compact Commissioner. Texas Motion for Leave at fn.1. For determining whether this Court should exercise its original jurisdiction, a case brought by a political subdivision and a political appointee of Texas is not a case brought by the Texas *qua state*. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972) (holding that "the term

(Continued on following page)

B. Facts

1. Rio Grande Compact

The Rio Grande rises in Colorado and in New Mexico and flows through those states into Texas, where it forms a boundary with the Republic of Mexico. *See* App. A. The river rises in the Colorado and New Mexico mountains and flows for the majority of its length through arid or semi-arid lands for which irrigation is required to cultivate the land and produce crops. Controversies over Rio Grande water commenced during the latter part of the nineteenth century and continued for many years. In 1929, the states of Colorado, New Mexico, and Texas entered into a temporary interstate compact to maintain the status quo in the basin pending adoption of a permanent compact. In 1938, the states entered into the existing permanent Compact, which replaced the temporary one, and it was approved and enacted into federal law in 1939.[4] The 1938 Compact expressly states its purpose and intent as: "[d]esiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with

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'States' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions").

[4] The 1938 Compact was signed at Santa Fe, New Mexico, March 18, 1938, ratified and approved by Colorado (1939 Colo. Sess. Laws 489), New Mexico (1939 N.M. Laws 59), and Texas (1939 Tex. Gen. & Spec. Laws 531). It was enacted into federal law by Public Law No. 96, ch. 155, 53 Stat. 785 (May 31, 1939).

respect to the use of the waters of the Rio Grande above Fort Quitman, Texas. . . ." Compact first paragraph. Water of the Rio Grande for uses in southern New Mexico and western Texas is stored in Elephant Butte and Caballo reservoirs, located in the southern portion of New Mexico. *See* App. A.

The Compact creates specific rights and obligations of the signatory states. Article III of the Compact establishes a schedule of deliveries from Colorado to the Colorado-New Mexico state line. New Mexico's delivery obligation to Elephant Butte Reservoir is created and defined by Article IV of the Compact, as amended in 1949: "[t]he obligation of New Mexico to deliver water in the Rio Grande *at Elephant Butte Reservoir* during each calendar year shall be measured by that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station . . . " (emphasis added) and by portions of Article VI of the Compact (permitting New Mexico the flexibility to accrue credits and debits for deliveries that are over or under the annual quantity determined by Article IV, as amended, within certain limits. "In the case of New Mexico, the accrued debit shall not exceed 200,000 acre-feet at any time. . . ."). Compact Art. VI.

Article VII prevents Colorado and New Mexico from storing water in reservoirs constructed after 1929 when Rio Grande Project Usable Water in storage

drops below 400,000 acre-feet.[5] Article VIII grants to Texas certain rights regarding the release of accrued debits from upstream storage in Colorado and New Mexico. Thus, the Compact governs certain Colorado and New Mexico releases, deliveries, and storage of Rio Grande water, all with a view to maximizing its use.

2. Rio Grande Project

Construction of the Project was authorized by the United States Congress pursuant to the Act of Congress on February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act"), enacted as a part of the existing federal reclamation program.[6] Section 8 of the Reclamation Act is a cornerstone of reclamation law and applicable to the Project. Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 388, 390 (codified as amended at 43 U.S.C. § 383). Section 8 mandates that the United States acquire rights for reclamation projects pursuant to state or territorial law of the area in

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[5] *Usable Water* is defined in the Compact at Article I(*l*) as "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico."

[6] The reclamation program has continuously evolved throughout history, and serves as an historic record of the socioeconomic development of irrigation and farming in America. *See California v. United States,* 438 U.S. 645, 648-70 (1978).

which the project is built,[7] and operate those projects in compliance with such laws except and unless they conflict with the Reclamation Act.[8] *See* 43 U.S.C. § 383:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . . ;

see also California v. United States, 438 U.S. 645, 665-70 (1978). Texas has wrongly referred to the Project rights as a "set aside" (Complaint at ¶ 7) or "reservations." *See* Texas Brief in Support at 8. These terms are incorrect. Rather, the rights were filed as appropriative rights in accordance with applicable Territorial New Mexico laws and Reclamation law. As an appropriative right, it is protected from injury under state law.

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[7] There may be exceptions to this rule in other parts of the West. No exceptions apply here. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1138 (10th Cir. 1981).

[8] Texas, for example, has a right to capture for groundwater. Tex. Water Code Ann. § 11.202. New Mexico follows the prior appropriation doctrine which is consistent with Reclamation requirements. *See* N.M. Stat. Ann. § 72-1-2, 43 U.S.C. § 372.

> In the western states, where the public waters are held subject to use by prior appropriators, it has always been the law that a prior appropriator from a stream may enjoin one from obstructing or taking waters from an underground source which would otherwise reach the stream and which are necessary to serve the stream appropriators' prior right.

City of Albuquerque v. Reynolds, 379 P.2d 73, 79 (N.M. 1962).

In 1906, the United States Reclamation Service (precursor to the Bureau of Reclamation ("Reclamation")), filed its required territorial water appropriation notice with the territory of New Mexico seeking a right to appropriate and store Rio Grande water in Elephant Butte Reservoir. The United States filed a supplemental notice in 1908 asserting an additional claim for all the unappropriated surface water of the Rio Grande and its tributaries. As is discussed in section II.C. below, the United States' Project rights[9] in New Mexico are currently being adjudicated in a Lower Rio Grande Adjudication pursuant to the McCarran Amendment. 43 U.S.C. § 666.

Pursuant to federal reclamation law, the United States allocates Rio Grande Project water ("Project water") for use by reclamation contract holders in

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[9] The United States' rights are to store and distribute water for beneficial uses.

New Mexico and Texas, including the two main irrigation districts for the Project, Elephant Butte Irrigation District ("EBID") for lands in New Mexico, and El Paso County Water Improvement District No. 1 ("EPCWID") in Texas. The Rio Grande Project Act and other federal reclamation laws and contracts require that Project water be delivered by the United States for beneficial use during the irrigation season of each calendar year based on authorized acreage within the Project ("Project lands") in New Mexico and Texas, and to assure delivery of an equal amount of water for each acre in the Project. Fifty-seven percent of the Project lands are located in the EBID in New Mexico and 43% in the EPCWID in Texas. The Compact does not allocate Project water between the New Mexico and Texas project beneficiaries, and Texas does not have an allocation of or contract for Project water from the United States.

ARGUMENT

I. TEXAS' CLAIMS ARE NOT APPROPRIATE FOR THE EXERCISE OF ORIGINAL JURISDICTION.

A. Texas' claims are not based on the express terms of the Compact.

This Court has original jurisdiction over all controversies between two or more states. 28 U.S.C. § 1251(a); U.S. Const. art. III, § 2, cl. 2. In cases invoking this Court's original jurisdiction, this Court

has construed its jurisdiction as obligatory "only in appropriate cases." *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (internal quotation omitted). This Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). This Court has declined to exercise its original jurisdiction in actions between two States. *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *California v. West Virginia*, 454 U.S. 1027 (1981); *Louisiana v. Mississippi*, 488 U.S. 990 (1988). This Court considers two factors when weighing whether to grant leave to file an original complaint: first, "the nature of the interest of the complaining state, focusing on the seriousness and dignity of the claim," and second, "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotations and citations omitted). This Court has also held it has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

This Court's original jurisdiction is reserved for those exceptional circumstances where there is a direct controversy between two states regarding assertion of their sovereign interests. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). This Court also guards its original docket against proposed complaints that fail to articulate a legally

sufficient cause of action. *See Florida v. Mellon*, 273 U.S. 12, 16, 18 (1927) (State of Florida's motion for leave to file complaint in this Court's original jurisdiction was denied because Florida failed to allege sufficient injury). "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (denying State of Ohio leave to amend its complaint because "the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action"). The nature of Texas' claims is important to the decision by this Court as to whether Texas' claims meet the high standards that are required to invoke this Court's original jurisdiction. *See Mississippi v. Louisiana*, 506 U.S. at 77. Texas does not meet this high standard because its claims fail to articulate a legally sufficient cause of action under the Compact. Instead, Texas' claims arise from the Project, not the Compact.[10]

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[10] "A State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. at 665.

B. New Mexico's Compact delivery obligation is to Elephant Butte Reservoir and not to the New Mexico-Texas state line.

New Mexico is in full compliance with all provisions of the Compact. New Mexico's delivery obligation to Elephant Butte Reservoir is created and defined by Article IV, as amended, and by portions of Article VI of the Compact that permit New Mexico to accrue credits and debits for deliveries within certain limits. *See* more detailed description above in Section B.1.

The Compact drafters knew how to craft a state line delivery obligation, and did so for Colorado. "The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos. . . ." is clear. Compact, Art. III. In contrast, New Mexico does not have a state line delivery obligation; rather, New Mexico's delivery point under Article IV, as amended, is to Elephant Butte Reservoir, which is located approximately 105 miles north of the state line.

The plain language of the Compact describes the injuries the States agreed were reserved to raise in the future. Article XI provides in relevant part:

> New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent

> recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, *at the point of delivery, be changed hereafter by one signatory state to the injury of another.*

Compact, Art. XI (emphasis added). Thus, by agreement of the parties and enacted into federal law, the Compact describes the elements of a valid Compact-based cause of action in this Court: that one state has changed the "character or quality of the water, at the point of delivery . . . to the injury of another." *Id.* Texas has not pled such a case.

Texas concedes that the Compact does not create an obligation of the State of New Mexico to deliver water to the State of Texas: "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation." Complaint at ¶ 10. However, Texas' Complaint then goes on to state that Texas seeks to invoke the original jurisdiction of this Court based on an interstate compact dispute. Texas' claims are not based on the terms of the *Compact*. Rather, Texas' Complaint asserts claims to *Project* water from a federal reclamation Project owned and controlled by the United States, not New Mexico.

C. Texas asks this Court to insert new terms into the Rio Grande Compact.

1. Texas asks this Court to rewrite the Rio Grande Compact.

The Compact lacks any requirement for New Mexico to deliver water to Texas below Elephant Butte Reservoir, and as this Court in *Texas v. New Mexico*, 462 U.S. 554 (1983), makes clear, a State cannot unilaterally interpret a Compact in a way that gives itself rights beyond the express terms of the Compact. For example, in *Texas v. New Mexico*, the Special Master recommended that the United States be authorized to cast a tie-breaking vote in the event of a 1:1 vote by the States of Texas and New Mexico, even though the Compact contained no such provision. *Id.* at 563. The Court rejected this recommendation to rewrite the Pecos River Compact, holding that:

> Other interstate compacts, approved by Congress contemporaneously with the Pecos River Compact, allow federal representatives a vote on compact-created commissions, or expressly provide for arbitration by federal officials of commission disputes. *E.g.*, Upper Colorado Basin Compact, 63 Stat. 31, 35-37 (1949); Arkansas River Compact, 63 Stat. 145, 149-151 (1949); Yellowstone River Compact, 65 Stat. 663, 665-666 (1951). *The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it.*

Id. at 565 (emphasis added).

Texas cannot insert into the Compact additional obligations for New Mexico below Elephant Butte Reservoir and then seek leave to file a Complaint as an "interstate water compact" claim. Motion for Leave at 2. This Court has consistently held that Compacts are state and federal law that the Court cannot rewrite.

> We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, *we will not "'order relief inconsistent with [the] express terms'" of a compact*, "no matter what the equities of the circumstances might otherwise invite."

Alabama v. N. Carolina, 130 S. Ct. 2295, 2312-13 (2010) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Texas v. New Mexico*, 462 U.S. at 564)) (emphasis added).

2. The plain language of the Rio Grande Compact simply does not include any protection of 1938 conditions.

Unable to show that New Mexico has failed to meet its delivery obligations under the Compact, and apparently having second thoughts about the bargain it struck, Texas has unilaterally invented new requirements not contained in the plain language of the Compact. Texas claims that "[a] fundamental purpose

of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed." Complaint at ¶ 10. As noted above, the Compact contains many specific provisions but none requiring the parties to assure maintenance of a 1938 condition at the Texas-New Mexico state line.

In 1929, Colorado, New Mexico, and Texas entered into a temporary Compact. Act of June 17, 1930, ch. 506, 46 Stat. 767. The 1929 Compact was replaced in its entirety by the 1938 Compact. Article III(d) of the 1929 temporary Compact explicitly references flows "between Elephant Butte Reservoir and the lower end of the Rio Grande Project. . . ." *Id.* at 770. However, the 1938 Compact contains no such reference. Article VII(b) of the 1929 temporary Compact also contains a broad and general protection of the status quo in each state. *Id.* at 771 ("The commission . . . shall equitably apportion the waters of the Rio Grande *as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of this compact*. . . .") (emphasis added). There is no comparable provision in the 1938 Compact.

3. The Rio Grande Compact does not require New Mexico to guarantee that water delivered to Elephant Butte Reservoir flow unimpeded to the New Mexico-Texas state line.

Texas also claims that the "purpose and intent" of the Compact is to require New Mexico to guarantee

that Project water flow "unimpeded" to the New Mexico-Texas state line. Complaint at ¶ 4. The Compact contains no such provision. Texas' claims are internally inconsistent. Texas first admits that the water delivered to Elephant Butte pursuant to Article IV of the Compact, as amended, is allocated to "Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." *Id.* Texas then claims New Mexico must assure that same water flows unimpeded to the Texas state line even though it admits that "[o]nce delivered" it is allocated to Project beneficiaries in both states based not on the Compact but under the Project authorization and relevant contractual arrangements. *Id.*

There is no express requirement, nor could there be, that New Mexico assure unimpeded flows below Elephant Butte Reservoir to Texas, because water released from Elephant Butte Reservoir is delivered for uses in both southern New Mexico and western Texas. This Compact does have provisions adjusting New Mexico's delivery to Elephant Butte Reservoir depending on additional depletions *above* New Mexico's upstream index gage (Otowi), but those are not relevant here. *See* Compact, Art. IV. There is no adjustment for depletions below Elephant Butte Reservoir.

The drafters of the Compact knew how to craft a prohibition on a state causing additional depletions in a certain stretch of river in a compact, but they

did not here. *See* Compact, Art. IV. The doctrine of *inclusio unius est exclusio alterius* compels the conclusion that the omitted terms were not intended to be included in the Compact. *See Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 838 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation omitted)). *See also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 180 (2003) (Scalia, J., dissenting) (referring to the doctrine as an accepted principal of construction).

Texas may not now rewrite the Compact to include a provision requiring unimpeded deliveries to the New Mexico-Texas State line.

> [C]ongressional consent transforms an interstate compact . . . into a law of the United States. One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.

Texas v. New Mexico, 462 U.S. at 564 (internal quotation and citations omitted).

The 1929 temporary Compact among Colorado, New Mexico and Texas was replaced by the current 1938 Compact. A comparison of the earlier compact with the current one also establishes that the 1938 Compact does not require New Mexico to protect

certain flows in the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line.

Article XII of the 1929 temporary Compact explicitly provided that:

> New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.

46 Stat. at 772. Articles XII, III(d), and VII(b) of the 1929 temporary Compact establish that in 1929, Texas bargained for and obtained explicit protections for the water supply of the Rio Grande in New Mexico below Elephant Butte Reservoir. The 1938 Compact, however, does not include these requirements below Elephant Butte Reservoir. Texas cannot simply rewrite the Compact to include provisions the states did not agree upon at the time.

This Court has relied on a comparison of related compacts to determine what is and what is not included in a subsequent compact. In *New Jersey v. Delaware*, the Court explained that

> Interstate compacts, like treaties, are presumed to be "the subject of careful consideration

> before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." Accordingly, the Special Master found informative a comparison of language in the 1905 Compact with language contained in an 1834 compact between New Jersey and New York.
>
> . . . .
>
> "Comparable language [conferring exclusive authority]," the Special Master observed, "is noticeably absent in the [1905] Compact." The Master found this disparity "conspicuous," for "[s]everal provisions in the two interstate compacts [contain] strikingly similar language."

552 U.S. 597, 615-16 (2008) (citations omitted).

Comparing the Compact with other compacts also compels the conclusion that the Compact does not require New Mexico to avoid additional depletions below Elephant Butte Reservoir. The Pecos River Compact expressly provides that "[e]xcept as stated in paragraph (f) of this Article, New Mexico *shall not deplete* by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." Pecos River Compact of 1949, ch. 184, Art. III(a), 63 Stat. 159, 161 (emphasis added). *See also* Arkansas River Compact of 1949, ch. 155, Art. IV(D),

63 Stat. 145, 147 ("[T]he waters of the Arkansas river . . . shall not be materially depleted in usable quantity or availability. . . ."). The plain language of the Compact simply does not include a similar provision. This Court should reject Texas' attempt to rewrite the Compact to include terms Texas wishes were there. *See Texas v. New Mexico*, 462 U.S. at 571 ("[R]ecourse to this Court when one State has second thoughts is hardly necessary for the State's protection." (Internal quotation omitted)).

Texas further claims that "New Mexico asserts that so long as it has made Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir." Complaint at ¶ 21. Texas misstates New Mexico's position. Groundwater has been developed and used in both New Mexico and Texas.

As noted above, and as required by reclamation law, adjudicated Project water rights are administered in priority. *See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Similarly, New Mexico law protects the United States' Project water rights from injury by junior water rights users. N.M. Stat. Ann. § 72-1-2 (2012); N.M. Const. art. XVI, § 2. New Mexico law has never varied on this point, and continues to protect senior rights from impairment by junior water rights users. *City of Albuquerque*, 379 P.2d at 79.

II. THE ISSUES RAISED BY TEXAS ARE BEING LITIGATED IN ALTERNATIVE FORA.

A. Texas' interests may be vindicated in ongoing cases in the Federal District Court and in the Lower Rio Grande Adjudication.

Texas asserts that New Mexico has "allowed and authorized Rio Grande *Project* water intended for use in Texas to be intercepted and used in New Mexico." Complaint at ¶ 4 (emphasis added). One of the factors that this Court considers in deciding whether to exercise its original jurisdiction is "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Here, ongoing litigation in both federal district court and the Lower Rio Grande Adjudication provide alternate fora for resolution of the issues Texas seeks to raise in its Complaint.

Texas argues neither forum can serve as an alternative to an original action before this Court because it is not a party to either action, and neither court has jurisdiction over it. Texas Brief in Support at 26-27. But that is not the test. Although this Court has sometimes stated that an alternative forum must have jurisdiction over the parties to the dispute, *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), it has since clarified that the more pertinent inquiry is whether the other forum has jurisdiction over the issues involved. *See Mississippi*, 506 U.S. at 77 (citing *Arizona v. New Mexico*, 425 U.S. at 797). Thus, if the

issues posed in an original complaint "can be resolved effectively by other litigation in other courts, *if need be by other parties* . . . , discretionary denials of original jurisdiction seem appropriate." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4053 (3d ed. 2008) (emphasis added).

This Court's decision in *Arizona v. New Mexico* illustrates this point. In that case, the Court denied Arizona leave to file an original complaint against New Mexico to challenge a tax New Mexico imposed on electricity generated in state but sold to out-of-state customers. 425 U.S. at 794-95. Arizona asserted an interest as a direct consumer of electricity subject to the tax, and as *parens patriae* on behalf of its citizens who purchased this electricity. *Id.* at 796. In denying Arizona leave to file, the Court observed that three Arizona utilities had filed an action in New Mexico state court challenging the tax's constitutionality. *Id.* The Court was "persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." *Id.* at 797 (emphasis in original). The Court reasoned that if the utilities prevailed, Arizona's interest would be vindicated. *Id.* If not, the utilities could petition for *certiorari*. *Id.* Either way, Arizona's interests would be protected. *Id.* Similarly, the issues Texas seeks to raise before this Court have been raised by other parties in other fora with jurisdiction over those issues. This Court should deny the motion for leave to protect the integrity of the judicial system. *Texas*, 462 U.S. at 570.

B. The United States' distribution of Rio Grande Project water is currently being litigated in Federal District Court.

Texas' Complaint concedes that New Mexico's delivery obligation under the Compact is to Elephant Butte Reservoir. Complaint at ¶ 4. Texas then goes on to plead a cause of action arising from what happens to that water after it is delivered to Elephant Butte and before it gets to the state line. This issue does not arise from the Compact, it arises from the Project.

In *New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 1, 2013), the State of New Mexico has brought an action against the United States relating, *inter alia*, to a 2008 Operating Agreement between it, EBID and EPCWID regarding the allocation and delivery of Project water to the Project lands. New Mexico contends that the "2008 Operating Agreement" for the Project materially changes the historic allocation and delivery of Project water to Project beneficiaries without Congressional approval and that violates relevant provisions of Reclamation Law. Texas is not a Project beneficiary. EPCWID, the only Project beneficiary in Texas, is a party to *New Mexico v. United States*. EPCWID is a political subdivision of the State of Texas. *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified on other issues*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

Like the utilities in *Arizona v. New Mexico*, EPCWID and the United States represent the interests of Texas irrigators in the delivery or allocation of Project water by the United States. EPCWID has every incentive and ability fully to assert and defend the rights of the Texas water users that could be affected by any alleged misappropriation of Project water in New Mexico. Texas' Complaint does not assert any right or interest that could result in the delivery of water to any entity or person other than EPCWID. As in *Arizona v. New Mexico*, if EPCWID prevails in lower court, any interest Texas might have in the delivery of water from the Project will be vindicated. *See* 425 U.S. at 797.

Texas' Complaint further asserts that *New Mexico v. United States* is an attempt to "control" the Project "in contravention of the Rio Grande Project Act and the Rio Grande Compact" and that New Mexico has asked the Court to "interpret the Rio Grande Compact incorrectly. . . ." Complaint at ¶ 20. As noted above, in *New Mexico v. United States*, New Mexico is challenging the validity of the 2008 Operating Agreement for the Project based on the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Reclamation Act 43 U.S.C. §§ 371 *et seq.*, and the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701-706. These challenges are not based on the Compact. None of these claims are against Texas and none fall within this Court's original jurisdiction. New Mexico also alleges in *New Mexico v. United States* that the United States' accounting for

and release of New Mexico's Compact Credit water is ultra vires and violates the Compact. This claim is a claim against the United States, not a claim against Texas.

New Mexico v. United States does not include an assertion by New Mexico that it has the authority to "control" the federally owned Project. New Mexico is not trying to "control" the Project. A decree granting the relief New Mexico seeks in *New Mexico v. United States* would only invalidate the 2008 Operating Agreement, at which time the United States could either revise the Operating Agreement or, return to its historic practice of annual accounting and equal distributions of water per project acre, that is, the operations method the United States followed between 1916 and 2007. William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. Denv. Water L. Rev. 1, 39-41 (2001).

Texas' allegations are not claims within this Court's original jurisdiction reserved for disputes between states. These claims are simply an attempt to interrupt New Mexico's federal district court case against the United States. This Court should permit the ongoing litigation to proceed, thereby allowing the legitimate processes of decision and appeal. This Court seeks to avoid interference with normal judicial function. *Texas v. New Mexico,* 462 U.S. at 570. That is why original jurisdiction is not available when there is an alternate forum.

Further, Texas' assertion of "novel" interpretations of law by a state in a court is not a matter of such seriousness and dignity, a "casus belli," that is a claim between States sufficient to invoke this Court's original jurisdiction. If that were so, any difference of opinion between states in any case as to the correct law would be a legitimate basis for requesting this Court to exercise its original jurisdiction.

C. The United States' claims to Rio Grande Project water are properly before the Lower Rio Grande Adjudication Court pursuant to 43 U.S.C. § 666.

Texas claims that New Mexico has "allowed and authorized Rio Grande *Project* water intended for use in Texas to be intercepted and used in New Mexico" to the detriment of the Project. Complaint at ¶ 4 (emphasis added). This is a *Project* claim and not a claim under the *Compact*. As a claimant to rights to the use of water in the state court adjudication, the United States has adequate state law remedies for any harm to the Project that groundwater pumping by junior appropriators in New Mexico might cause. The scope of the United States Project right, and its right to redress for any injury thereto, are among the issues currently before the Lower Rio Grande Adjudication Court having jurisdiction over the claims of the United States to water for the Project pursuant to the McCarran Amendment, 43 U.S.C. § 666.

The long and complex history of the adjudication of state and federal water rights in the Lower Rio Grande is set forth in *United States v. City of Las Cruces*, 289 F.3d 1170, 1177-79 (10th Cir. 2002). After *City of Las Cruces*, the United States filed its "Statement of Claim" in the Lower Rio Grande Adjudication:

> Defendant United States, on behalf of the U.S. Department of Interior, Bureau of Reclamation, claims a right to water to meet the needs of the [Rio Grande] Project. . . . Pursuant to these authorities, the United States is entitled to divert to storage, impound, and store the surface waters of the Rio Grande. The surface waters are stored behind Elephant Butte Dam. . . . Additionally, based on its releases [of water from Elephant Butte Dam] the United States is entitled to a delivery of water at downstream canal headings and diversion points to meet Project purposes. The delivered water consists of water released from storage in Elephant Butte and Caballo reservoirs and all water entering the Rio Grande within the Project whether from return flows of water used for irrigation or municipal and industrial purposes (or any other purpose authorized under Reclamation Law), or tributary waters such that, for example, a release of 790,000 acre-feet of stored water shall result in a delivery of 958,055 acre-feet of usable water. The return flows or tributary waters may be from surface or groundwater sources.

United States' Statement of Claim for Water for the Rio Grande Project at 1-2, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Sept. 15, 2010), https://lrg adjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html.

The McCarran Amendment, 43 U.S.C. § 666 provides that: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source. . . ." The McCarran Amendment was intended to address potentially conflicting claims to the use of water under state and federal law. As explained by the Senate Judiciary Committee, a McCarran Amendment adjudication was "intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights. . . ." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). This Court has held that the McCarran Amendment is "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights." *United States v. Dist. Court ex rel. Eagle County, Colo.*, 401 U.S. 520, 524 (1971).

Congress in the 1902 Reclamation Act intended that the United States follow state law for the appropriation of water and the operation of Reclamation projects. *See California v. United States*, 438 U.S. at

668 n.21, 675 (explaining and affirming the consistent thread of deference to state water laws in the Reclamation Act). Therefore, the Lower Rio Grande Adjudication will determine the elements of the right of the United States for the Project from Elephant Butte Dam to the New Mexico-Texas state line, including any Project rights to intervening surface or groundwater. Decisions by the Lower Rio Grande Adjudication Court will be subject to appeal to the Court of Appeals of New Mexico, the New Mexico Supreme Court, and ultimately subject to review by this Court on certiorari. *See Arizona v. New Mexico*, 425 U.S. at 797; *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570-71 (1983) (holding that federal courts should defer to McCarran adjudications of Indian water rights, but cautioning that state court decisions are still subject to review by the Supreme Court).

The Lower Rio Grande Adjudication Court has considered the United States' claim that state law is inadequate to protect the Project from injurious groundwater pumping. However, the adjudication court held that the United States could not identify any actual conflict between reclamation law and state law remedies, and it has adequate remedies for any claimed injury to Project rights from junior groundwater pumpers. *See* Order Granting the States' Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 2-4, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Aug. 16, 2012) (Order

Dismissing Groundwater Claims), https://lrgadjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html. Furthermore, a subsequent New Mexico Supreme Court decision upheld New Mexico's ability to enforce priority administration prior to a final adjudication. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio,* 289 P.3d 1232, 1240-41 (N.M. 2012). Therefore, the United States has state law remedies for any harm it may allege that junior water right holders are causing to the Project.

Texas' motion is an attempt to circumvent the Lower Rio Grande Adjudication for the purpose of asserting before this Court the United States' claim to water for the Project. This Court has stated, however, that it grants original jurisdiction only sparingly and "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. at 570. Denying Texas' motion will protect the integrity of the McCarran Amendment adjudication and will promote the most effective functioning of the overall federal system.

III. TEXAS' MOTION FOR LEAVE MUST BE DENIED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY AND HAS NOT CONSENTED TO JOINDER IN THIS ACTION.

The State of Texas has not attempted to join the United States in the present action, and even if it had, the United States has not consented to joinder.

"A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party." *Arizona v. California*, 298 U.S. 558, 572 (1936). The United States is not subject to suit without its consent, even by a state. *Id.* at 568. Moreover, even if the United States chose to attempt to intervene, the Motion should be denied for the other reasons stated herein.

Failure to join the United States requires the dismissal of the complaint in an original jurisdiction case where (1) the United States has been active in exercising authority over matters at issue in the case and (2) failure to join the United States would result in prejudice to its interests. *See Idaho v. Oregon and Washington*, 444 U.S. 380, 390-91 (1980) (case later dismissed for lack of proof of injury, 462 U.S. 1017, 1028 (1983)) (citing *Arizona v. California*, 298 U.S. at 570 and *Texas v. New Mexico*, 352 U.S. 991 (1957)). If a decree will "necessarily affect[ ] adversely and immediately the United States," the United States is indispensable and the case should be dismissed. *Id.* at 391 (citing Green, J., Report of Special Master: Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties, *Texas v. New Mexico*, No. 9, Orig., at 41 (1953)).

In a prior *Texas v. New Mexico* dispute involving Rio Grande Compact claims, this Court dismissed the Complaint because the United States was an indispensable party in its role as trustee for tribal interests. 352 U.S. 991 (1957). The Special Master concluded that to grant Texas the relief sought would

"necessarily affect adversely and immediately the United States. . . ." Green, J., Report of Special Master: Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties, *Texas v. New Mexico* No. 9 Orig., at 41 (1953). Here, Texas pleads specifically for relief based on "the authority of the United States to operate the Rio Grande Project." Complaint at ¶¶ 15-16. This question pertains to the scope of the United States' claimed Project rights currently before the Lower Rio Grande Adjudication Court. As noted above, if and when the United States asserts its Project rights are injured by groundwater pumping, it has adequate remedies for those injuries under state law. *See* Order Dismissing Groundwater Claims at 4, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html; *see also City of Albuquerque*, 379 P.2d at 79.

Texas' Motion for Leave should be denied because the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project. These interests include the water rights for the Project and the delivery of Project water pursuant to the contracts between the United States and the water districts in New Mexico and Texas. *See Arizona v. California*, 298 U.S. at 564, 571-72. The United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas. Any decree entered in the absence

of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir. *See Shields v. Barrow*, 58 U.S. (17 How.) 130, 142 (1854); *Arizona v. California*, 298 U.S. at 571-72. This Court should deny Texas' Motion for Leave because the United States is not a party to this case.

IV. TEXAS' FULL FAITH AND CREDIT AND GOOD FAITH AND FAIR DEALING ARGUMENTS HAVE NO MERIT.

Texas' full faith and credit claim, that Texas' state water adjudication should be enforced by New Mexico in New Mexico, has no merit. Complaint at ¶ 22. While the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution is exacting where it applies, one state's court may not "reach into" another state's courtroom to determine a matter in the "exclusive province of the other State" or to interfere with litigation over which the first state has no authority. *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 235, 238 (1998). The full faith and credit effect of one state's judgment "cannot reach beyond [the controversy in that state] to control proceedings . . . in other States" when the controversy in another state involves differing parties, different claims and merits not considered in the first state. *Id.* at 238. The first state "has no power over those parties." *Id.*

Further, pursuant to the Reclamation Act and a series of federal laws, Congress has exhibited a "consistent purpose to avoid disturbance of state authority"

over water rights within each state's boundaries. *El Paso County Water Improvement Dist. No. 1*, 133 F.Supp. at 904. As such, New Mexico and Texas have not "subordinated [their] laws governing water rights to the irrigation program of the Project." *Id.* at 903-05. Moreover, state water adjudications have no "extra-territorial force"; one state cannot control the use of water in the next state by virtue of a state adjudication. *Id.* at 924. Water rights adjudicated and granted pursuant to one state's laws cannot "supplant" the law of the next state. *Id.*

Texas also alleges New Mexico's legal positions in the Lower Rio Grande Adjudication proceeding "constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact." Complaint at ¶ 21. Texas misapprehends the law applicable to interstate compacts. Recently this Court noted:

> We have never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing. . . . We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, we will not "'order relief inconsistent with the express terms'" of a compact, "no matter what the equities of the circumstances might otherwise invite."

Alabama v. North Carolina, 130 S.Ct. 2295, 2312-13 (2010) (quoting *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 564)).

CONCLUSION

The lower courts are alternative fora for consideration of the issues Texas seeks to raise herein. The issues are not a dispute between states. The United States has not consented to joinder. This Court should deny the motion for leave. Alternatively, if the Court grants the Motion, New Mexico requests the opportunity to file a motion to dismiss at the outset of further proceedings.

Respectfully submitted,

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RECORD AND BRIEFS

FILED
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No. 22O141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to File Complaint

REPLY BRIEF OF THE STATE OF TEXAS

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No. 22O141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

REPLY BRIEF OF THE STATE OF TEXAS

The State of Texas[1] hereby replies to New Mexico's Brief in Opposition to Texas' Motion for

[1] In direct response to New Mexico's contentions, the Rio Grande Compact Commissioner for the State of Texas, the Texas Commission on Environmental Quality, and the Attorney General of Texas are of the state, and are not "political subdivisions." New Mexico's reliance on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) to question Texas' authority to file, is misplaced. *See* Opp. at 3, n.3. In an abundance of caution, attached hereto as Appendix A is a reprinted letter

Footnote continued on following page.

Leave to File Complaint (New Mexico's Opposition or Opp.).[2]

SUMMARY OF ARGUMENT

New Mexico seeks to avoid this Court's interpretation and enforcement of the Rio Grande Compact (Compact). New Mexico's Opposition should be rejected for at least four reasons. First, New Mexico's Opposition confirms that Texas and New Mexico have fundamental differences regarding the interpretation of Texas' rights and New Mexico's obligations under the Compact. New Mexico's actions, for example, violate, at a minimum, Articles I and IV of the Compact. Texas has standing to sue New Mexico because it does not receive the water it bargained for. Second, most of New Mexico's Opposition involves the merits of the case, including disputed factual matters, which are not part of the criteria for assessing a motion for leave to file a complaint. Third, this Court is the only forum that can resolve the issues tendered and the relief sought by Texas. Fourth, the United States is not an indispensable party.

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from the Attorney General of Texas confirming that Texas' pleadings are authorized submissions by the State of Texas.

[2] Colorado's Brief in Opposition takes no position with respect to the specific allegations contained in Texas' pleadings and, therefore, no separate reply to Colorado's Brief is necessary. Responses to assertions made by the City of Las Cruces are incorporated into this reply.

ARGUMENT

I. New Mexico's Opposition Confirms the Parties' Fundamental Differences Regarding Interpretation of the Compact, and Only This Court Can Resolve the Dispute

New Mexico argues that the Court should decline to accept jurisdiction because the Complaint fails to state a claim under the "express terms" of the Compact. Opp. at 9-11. There is, however, no requirement that an "express term" of a compact be violated in order for the Court to properly exercise its jurisdiction. Where the Court has accepted jurisdiction to address compact interpretation relating to depletions of surface flows by upstream groundwater pumping (as here), the absence of an express provision is what gave rise to the dispute and, therefore, proper exercise of jurisdiction. *See Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765 (2011) (Yellowstone River Compact does not mention groundwater); *Kansas v. Nebraska*, 538 U.S. 720 (2003) (Republican River Compact does not mention groundwater); *Kansas v. Colorado*, 514 U.S. 673 (1995) (Arkansas River Compact does not mention groundwater); *Texas v. New Mexico*, 462 U.S. 554 (1983) (Pecos River Compact does not mention groundwater).

New Mexico mistakenly asserts that Texas' claims are not based on the terms of the Compact

but rather "arise from the [Rio Grande] Project." Opp. at 11. The Rio Grande Project (Project), however, is inextricably intertwined with the Compact. [3] The Compact cannot be understood without an understanding of the Rio Grande Project. The interrelationships between the Compact and the Project do not convert Texas' Compact claims into Project Claims. Texas' claims arise from the Compact.

Under New Mexico's view of the Compact, its only obligation is to deliver certain volumes of water to Elephant Butte Reservoir and it has absolutely no responsibility to address actions that it has authorized and allowed to occur within New Mexico between the reservoir and the Texas state line. Opp. at 12-14. New Mexico, however, cannot unilaterally define its Compact obligations. "A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States . . . is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). New Mexico's understanding of its obligations only confirms the extent of this fundamental disagreement between the two states, and supports

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[3] The Rio Grande Project is referred to directly in the definition of "project storage" in Article I(k) of the Compact, and indirectly (by the use of that definition in other defined terms) over 50 times in the Compact.

the need for the Court to exercise its original jurisdiction in this case.

New Mexico's interpretation of its obligations under the Compact conflicts with the intent of the parties as expressed in the Compact's preamble:

> The State of Colorado, the State of New Mexico, and the State of Texas, [among other reasons] ... *for the purpose of effecting an equitable apportionment of such waters*, have resolved to conclude a Compact for attainment of these purposes....

Compact, 53 Stat. 785 (1939) (emphasis added); Appendix to Complaint at App. 1.

The water being equitably apportioned are those waters of the "Rio Grande Basin" as defined in Article I(b) of the Compact. The water apportioned to New Mexico by the Compact is the water in the Basin *above* Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. No water below Elephant Butte is apportioned to New Mexico. Under Articles I(k), (l) and (o) and Article IV the water in Elephant Butte is "project storage" of the Rio Grande Project, all of which is apportioned to Texas. This plain language assumes that water equitably apportioned to Texas will actually reach Texas unencumbered by the actions of New Mexico. Nothing in the Compact allows New Mexico to deliver its flow requirements into

Elephant Butte and then take it back once the water is delivered.[4] Accepting New Mexico's position would cause the Compact to fail for lack of consideration because Texas would have obtained nothing in return for its agreement to limit its claims to water from the Rio Grande.

Contrary to New Mexico's assertions, Texas is not asking the Court to rewrite or insert new terms into the Compact. *See* Opp. at 14-16. Rather, Texas seeks an interpretation of the Compact based on the language of the Compact, the intent of the signatories, and the circumstances that existed at the time the Compact was entered into. These circumstances include the parties' assumption embodied in the Compact that Project water would be allowed to flow unimpeded into Texas. Compacts are contracts, and the Court interprets compacts according to the intent of the parties. *Montana v. Wyoming*, 131 S.Ct. at 1771 n.4; *Alabama v. North Carolina*, __ U.S. __ , 130 S.Ct. 2295, 2317 (2010) (Kennedy, J., concurring). To ascertain the intent of the parties and aid in its interpretation, the Court may consult extrinsic evidence including the parties' course of performance, *Alabama*, 130 S.Ct. at 2310; contemporaneously enacted interstate compacts, *Texas*, 462 U.S. at 565; and the history of compact

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[4] New Mexico's right, if any, to take water from storage in Elephant Butte is based solely on federal contracts issued under the authority of the Project. *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977).

negotiations, *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). Where there is a dispute of the parties' intent, extrinsic material is appropriately considered. *See Alabama*, 130 S.Ct. at 2317 (Kennedy, J., concurring).

New Mexico implicitly acknowledges the importance of extrinsic evidence when it cites to the 1929 Compact[5] and the Pecos River Compact to support its interpretation of the Rio Grande Compact. *See* Opp. at 16, 20. New Mexico, however, selectively ignores other extrinsic evidence, including the conditions that existed when the signatories drafted the Compact. A plain reading of the Compact should "make[ ] sense in light of the circumstances existing in the signatory States when the Compact was drafted." *Montana*, 131 S.Ct. at 1778 (noting that the Yellowstone River Compact "would have been written to protect the irrigation uses that were legislatively favored ....") To resolve the current and serious dispute over waters of the Rio Grande, Texas asks this Court to interpret, not rewrite, the Compact in accordance with the circumstances that existed at the time the Compact was drafted and executed.

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[5] Ironically, by citing and relying on Article XII of the 1929 Compact, New Mexico has violated its agreement in Article XVI of the 1929 Compact. *See* 46 Stat. 767, 773.

II. Merits Arguments Are Irrelevant to This Court's Decision to Grant Texas' Motion

Most of New Mexico's Opposition addresses the merits of the case. *See* Opp. at 9-21. The question of whether the Court has jurisdiction over an original action is distinct from whether the complaint should be dismissed on the merits. *See Wyoming v. Oklahoma*, 502 U.S. 437, 441 (1992) ("[W]e granted Wyoming leave to file its bill of complaint over Oklahoma's objections that Wyoming lacked standing to bring this action and ... should not be permitted to invoke this Court's original jurisdiction."). The Court should not consider New Mexico's premature request to decide the relative strength of the evidence. The purpose of the Motion for Leave is to determine whether Texas should be given a chance to prove its claims. The Court has stated: "[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *see also Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (overruling demurrer to the bill of complaint on the grounds that Kansas should be allowed to discover facts necessary to prove its case). *See also Montana v. Wyoming*, 552 U.S. 1175 (2008) (the Court granted Montana leave to file a complaint, and, in the opinion granting leave, allowed Wyoming to file a motion to dismiss which was denied); *Montana v. Wyoming*, 131 S.Ct. at 1769.

At this stage, the Court only assesses the nature of Texas' interest in the interpretation and enforcement of the Compact and the adequacy of an alternative forum. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The Court does not now assess the merits of either side's Compact interpretation.

III. The Issues Tendered by Texas Cannot Be Resolved in Alternative Forums

New Mexico claims that the federal court litigation it initiated in New Mexico (District Court), and the general stream adjudication in New Mexico's state court (State Adjudication), are adequate alternative forums to this original jurisdiction action by Texas. Opp. at 22. Texas' claims, however, arise from its dispute with New Mexico over proper interpretation of the Compact, and from New Mexico's refusal to respect Texas' equitable apportionment of Rio Grande water. No other forum has jurisdiction to resolve these disputes and no alternative forum is currently involved in these disputes. Only this Court can vindicate Texas' claims involving interstate compact interpretation and enforcement. *See Texas v. New Mexico*, 462 U.S. at 568-69 (finding the Court's exercise of its original jurisdiction was appropriate, in part, because "New Mexico is the upstream State, with effective power to deny water altogether to Texas ....").

A. The Federal District Court Action in New Mexico Is Not an Adequate Alternative Forum

New Mexico asserts that its District Court suit challenging the 2008 Operating Agreement is a sufficient alternative forum. The 2008 Operating Agreement, however, is not directly an issue in this case. Texas' Complaint neither seeks to defend nor attack that Agreement. New Mexico's federal lawsuit argument is an attempt to circumvent the exclusive jurisdiction of this Court. *See Mississippi v. Louisiana*, 506 U.S. at 77-78 (rejecting federal district court jurisdiction over an interstate boundary dispute because Congress granted "original and *exclusive* jurisdiction of all controversies between two or more States" to the Supreme Court) (quoting 28 U.S.C. § 1251(a), emphasis in original). New Mexico, in fact, alleges that its challenge to the 2008 Operating Agreement is "not based on the Compact," and that "[n]one of the[] claims are against Texas." Opp. at 25. Because the District Court action involves different parties and different issues, it is not an adequate forum for Texas' Compact claims.

Any judgment entered in the District Court action will not provide the protection of Texas' equitable apportionment of water under the Compact. New Mexico cites *Arizona v. New Mexico*, 425 U.S. 794 (1976), a tax case, for the proposition that a related action based on similar issues provides an alternative forum. Opp. at 23. That case is

inapposite because it did not involve an interstate compact. Only the Supreme Court has both original and *exclusive* jurisdiction over disputes like this one involving the states' sovereign interests in interpretation and enforcement of interstate compacts. *Mississippi v. Louisiana*, 506 U.S. at 77-78; *see also Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

B. The General Stream Adjudication of the Lower Rio Grande in State Court Is Not an Adequate Alternative Forum

This Court does not allow intrastate general stream adjudications to interfere with the exercise of its original jurisdiction. *Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River concurrent with general stream adjudications on Colorado tributaries); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master (Feb. 10, 2010) (Special Master found that intrastate remedies did not preclude Montana from enforcing its rights under the Yellowstone Compact).

A state court stream adjudication cannot resolve disputes between states as to the apportionment of interstate waters. *See Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907) (the Court's exercise of its original jurisdiction is necessary to determine the relative rights of two states to an interstate stream). Texas cannot be made a party to

the State Adjudication without its consent. Where the terms of an interstate compact are in dispute, it is the role and duty of this Court to resolve that dispute. *Texas v. New Mexico*, 462 U.S. at 567-68.

New Mexico incorrectly asserts that the United States' claims to Project water in the State Adjudication provide a state law remedy to vindicate Texas' interests. *See* Opp. at 31. New Mexico confuses the United States' distinct interest in Project water with Texas' interest in obtaining and seeking interpretation and enforcement of the Compact. While the State Adjudication may resolve intrastate disputes, it will not remedy interstate claims for violation of an interstate compact.

IV. The United States Is Not an Indispensable Party[6]

The Court need not consider the indispensability of the United States in determining whether to exercise original jurisdiction. *See Idaho ex rel. Andrus v. Oregon & Washington*, 429 U.S. 163, 164 (1976). Regardless, the United States is not an indispensable party because Texas' claims against New Mexico do not implicate the Bureau of Reclamation's (Reclamation) role in distributing

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[6] New Mexico uses the term "indispensible" parties which reflects the 1957 language of Federal Rule of Civil Procedure 19. Since then, Rule 19 has been liberalized and refers to the feasibility of joining a "required" party.

Project water, or the United States' role as a trustee for Native American tribes. New Mexico argues incorrectly that a decree issued by this Court will affect the United States' interests in the Project. *See* Opp. at 33. This action, however, involves New Mexico's unlawful authorization of the interception and use of water in New Mexico that is apportioned to Texas under the Compact. Complaint at ¶¶ 19, 20. This action does not challenge or directly involve the United States' role in operating or delivering Project water. This Court can afford Texas full relief without the United States. As such, the United States is not indispensable to this action. *Idaho ex rel. Evans v. Oregon & Washington*, 444 U.S. 380, 392 (1980) (holding the failure to join the United States did not require dismissal); *see also Nebraska v. Wyoming*, 295 U.S. 40, 42-43 (1935) (holding that the United States was not an indispensable party, despite federal management of related water storage reservoirs).

New Mexico's reliance on *Texas v. New Mexico*, 352 U.S. 991 (1957) is misplaced. There the Court adopted the ruling of the Special Master that the United States was an indispensable party, but did so specifically and solely due to the United States' role as trustee for tribes situated *above* Elephant Butte Reservoir. *Texas v. New Mexico*, No. 9 Orig. (1953), Green, J., Report of Special Master: Respecting Indispensability the United States and of Elephant Butte Irrigation District, as Parties, at 47. The Special Master rejected *all* of New Mexico's other indispensable party claims, including the

United States' obligations with respect to Mexico, and federal ownership of Elephant Butte and Caballo Reservoirs. *Id.* at 13, 16, 21-23.

Here, Texas seeks no relief that would affect the rights or interests of the United States; Texas' claims will not prejudice the interests of the United States; and Texas does not allege that Reclamation is releasing more surface water to Project beneficiaries in New Mexico than it should. The United States will not need to take action in order for this Court to afford complete relief to Texas. As a result, the interests of the United States are not so intertwined in the resolution of Texas' claims so as to restrict the Court's ability to render a final judgment of such claims. Accordingly, the United States is not an indispensable party.[7]

V. This Court Can Require New Mexico to Give Full Faith and Credit to Texas' State Water Adjudication

The Full Faith and Credit Clause of the United States Constitution requires that New Mexico acknowledge Texas' state adjudication of Rio Grande water. Absent New Mexico's compliance with the Compact, the Texas adjudication loses its

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[7] While the United States is not indispensible, Texas would not object to the United States' intervention, or the Court's obtaining the United States' views with respect to the issues raised by Texas.

practical effect. Complaint at ¶ 22. By not acknowledging the Texas adjudication, New Mexico fails to comply with the Compact.

CONCLUSION

The State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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March 2013

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 13, 2013

Mr. Stuart Somach
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500 Capitol Mall, Ste. 1000
Sacramento, CA 95814

Re: *State of Texas v. State of New Mexico & State of Colorado,* No. 220141 in the Supreme Court of the United States.

Dear Mr. Somach:

This is to confirm that you have been authorized to represent the State of Texas in the above captioned matter by your outside-counsel contract with the Texas Commission on Environmental Quality (2013-582-0356) executed under the authority found in Texas Government Code §402.0212, 1 Texas Administrative Code, Chapter 57 and the General Appropriations Act, 82nd Leg., H.B. 1, art. IX §16.01. This office confirms that pursuant to this authority any filings you make in this case are made on behalf of the State of Texas.

Sincerely,

/s/ J D Blacklock
James D. Blacklock
Deputy Attorney General for Legal Counsel

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No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, Texas's motion for leave to file a complaint should be granted, and New Mexico should be invited to file a motion to dismiss.

STATEMENT

The State of Texas seeks leave to file a complaint to enforce its rights under the Rio Grande Compact (Compact). See Act of May 31, 1939, ch. 155, 53 Stat. 785; Compl. App. 1-20. The Compact apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir, a federal Bureau

of Reclamation (Reclamation) project that was authorized, constructed, and had been distributing water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact. Elephant Butte is approximately 105 miles north of the Texas state line.

Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte, thereby diminishing the amount of water that flows into Texas. New Mexico contends that the Compact does not require it to deliver any specific amount of water to the Texas state line, and that Texas therefore fails to allege a violation of the Compact.

A. The Rio Grande Basin

The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville. Pl. Br. 5-6 & n.2; Pl. Br. App. A1 (map).

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. The Basin is about 700 miles long and has a drainage area of approximately 34,000 square miles. National Resources Committee, Regional Planning, Part VI—The Rio Grande Joint Investigation in the

Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937, at 7 (1938) (Joint Investigation).

B. The Rio Grande Project

1. In the 1890s, regular water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions upstream. Joint Investigation 8, 73. In response, the Department of the Interior began to investigate the potential for storage and irrigation projects in the upper Rio Grande Basin. *Ibid.*

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, Texas, and other western States, Reclamation presented detailed results of an engineering analysis and proposed to build a dam at the current site of Elephant Butte Reservoir. See U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-04*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 395-420 (1905). Reclamation further recommended that water from the reservoir be delivered to Texas and New Mexico in amounts proportional to the irrigable lands within each State. *Id.* at 425. Representatives from Texas and New Mexico, as well as a delegation from Mexico, endorsed the project. See Official Proceedings of the Twelfth National Irrigation Congress 107 (Guy E. Mitchell ed., 1905).

2. The Reclamation Act of 1902 provided authorization and funding for irrigation works in various States, including New Mexico. See Act of June 17, 1902, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at

Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Secretary was authorized to proceed with construction of the dam only after determining that there was "sufficient land in New Mexico and in Texas which can be supplied with the stored water" at a price sufficient to reimburse the federal government for the cost of the project. *Ibid.* In 1906 and 1908, the United States filed notices with the Territory of New Mexico of the federal appropriation of and the right to use specified waters of the Rio Grande. Joint Investigation 73.

Construction of the Rio Grande Project (Project) began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. Joint Investigation 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73, 85.

The Project is designed to deliver more water than it releases from storage. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off the agricultural fields into drains. When these "return flows" get back to the river, they can be delivered to Project beneficiaries downstream. Return flows have historically comprised a significant part of the Project's deliveries. See Joint Investigation 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

3. In 1906, Reclamation entered into contracts with two irrigation districts—the entities now known as

Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land (67,000 acres in Texas, and 88,000 acres in New Mexico). Joint Investigation 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. App., *infra*, 1a-4a. The contract provides that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Id.* at 2a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico. Pursuant to the 1938 contract, which was also signed by the Assistant Secretary of the Interior, *id.* at 4a, Reclamation calculates diversion allocations on the same proportions today. See pp. 18-19, *infra*.

4. In addition to water that the Project delivers to EBID and EPCWID pursuant to contracts, the Project also delivers water to Mexico pursuant to a treaty. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, Art. II, May 21, 1906, U.S.-Mex., 34 Stat. 2954.

C. The Rio Grande Compact

The Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The Project

did not, however, resolve concerns about development upstream of Elephant Butte that was depleting the water supply to the Project. In 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate an apportionment of the waters of the Rio Grande. Act of Mar. 2, 1929, ch. 520-521, 45 Stat. 1502.

To maintain the status quo on the River pending negotiation of a permanent compact, the States agreed to an interim compact, which Congress approved. Act of June 17, 1930, ch. 506, 46 Stat. 767. Article XII of the interim compact provided that "New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." 46 Stat. 772.

The parties signed the Rio Grande Compact on March 18, 1938, approximately one month after EPCWID and EBID entered into the contract confirming the acreage in each State that would receive Project water. See p. 5, *supra*. Congress approved the Compact the following year. Act of May 31, 1939, ch. 155, 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas" and "for the purpose of effecting an equitable apportionment of such waters." Preamble, 53 Stat. 785.

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gauging stations. 53 Stat. 787-788.

Article IV requires New Mexico to deliver water at San Marcial, New Mexico—a gauging station upstream of Elephant Butte—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission (RGCC), established under Article XII of the Compact, 53 Stat. 791, changed the gauge for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte. Compl. para. 13; N.M. Br. in Opp. 1 n.1.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of debits and credits. It establishes limits on the total amount of debits and credits that an upstream State may accrue and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte] at all times to the extent of its accrued debit." Art. VI, 53 Stat. 789-790.

The combined capacity of Elephant Butte and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "project storage." Art. I(k), 53 Stat. 786. The Compact defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." *Ibid.*

D. The Current Controversy

1. Texas contends that once New Mexico delivers water to Elephant Butte as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground" downstream of Elephant Butte in New Mexico. *Id.* para. 18.

Thus, Texas contends that if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte in excess of Project allocations, deliveries of water to Project beneficiaries in Texas and to Mexico cannot be assured. Compl. para. 11. Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. *Id.* paras. 18, 19.

Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." Compl. para. 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which requires additional releases from Elephant Butte and thereby decreases the amount of water stored in the Reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id.* para. 19.[1]

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Compl. pp. 15-16.

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[1] New Mexico does not appear to contest that there have been substantial diversions of surface water and groundwater in New Mexico. Indeed, New Mexico has brought suit in federal district court challenging a 2008 settlement agreement among Reclamation, EBID, and EPCWID (the 2008 Operating Agreement) that effectively requires EBID to account for changes in Project efficiency caused by groundwater pumping in New Mexico. See pp. 18-19, *infra*. In that suit, New Mexico alleges that the use of water by the Project has "drastically changed" since the settlement "in that approximately 150,000 acre-feet less per year has been delivered to New Mexico than was delivered prior to the 2008 Operating Agreement." 1:11-cv-00691 Docket entry No. 45, para. 46 (Feb. 14, 2012); see also pp. 18-19, *infra* (discussing *Supplemental Environmental Assessment* prepared by Reclamation in connection with the 2008 Operating Agreement).

2. New Mexico contends (Br. in Opp. 15-21) that it has complied with its obligation under Article IV of the Compact to deliver water to Elephant Butte, and that the Compact does not require New Mexico to deliver any amount of water to the Texas state line. New Mexico thus contends that the Complaint does not allege a violation of any express term of the Compact; rather, New Mexico contends, Texas alleges at most that Texas water users are not receiving water that they have contracted with the United States to receive. *Ibid.* New Mexico notes that Article XII of the 1929 interim compact provided Texas with "explicit protections for the water supply of the Rio Grande in New Mexico below Elephant Butte" that were not carried forward into the 1938 Compact. *Id.* at 18-20; see 46 Stat. 772.

New Mexico further contends that there are alternative fora for resolution of the issues raised in Texas's complaint, Br. in Opp. 22-31, and that the Court should deny Texas leave to file its complaint because the United States is an indispensable party that has not consented to joinder, *id.* at 31-34.

3. Colorado takes no position on Texas's allegations and states that it cannot support Texas's motion until it better understands the alleged Compact violation at issue. Colo. Br. in Opp. 1-5.

DISCUSSION

The Court should grant Texas leave to file its complaint. Texas alleges an interstate dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. New Mexico's challenges to the complaint's legal sufficiency turn on the interpretation of the Compact and

thus should be resolved on their merits. At this threshold stage, Texas has adequately pled an injury to its sovereign rights under a reasonable interpretation of the Compact.

The United States additionally suggests that this Court provide a mechanism for the parties to address potentially dispositive legal issues. Resolution of those issues, which could be placed before the Court through a motion in the nature of a motion to dismiss, could significantly facilitate disposition of the controversy.

I. TEXAS'S COMPLAINT ALLEGES A CONTROVERSY THAT WARRANTS THE EXERCISE OF ORIGINAL JURISDICTION

This Court has original and exclusive jurisdiction over a case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767, 771-772 (1998); *Kansas* v. *Colorado*, 514 U.S. 673, 675 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). The Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under its exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (internal quotation

marks and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Applying those standards, Texas's complaint presents a controversy warranting the exercise of original jurisdiction.

A. Texas's Claim Of A Breach Of The Interstate Water Compact Asserts A Substantial Sovereign Interest

1. In claiming that New Mexico is depriving Texas of its lawful share of the water of an interstate stream, Texas asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Montana* v. *Wyoming*, 131 S. Ct. 1765 (2011); *Texas* v. *New Mexico*, 462 U.S. at 567-568; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). If Texas is correct that New Mexico violates the Compact by allowing New Mexico water users to use Rio Grande surface water, tributary flow, or return flows below Elephant Butte beyond what is authorized in the Compact—and if New Mexico users are thereby significantly intercepting or impairing the flow of Project water that Texas is entitled to receive under the Compact—such interference would be actionable. See *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987).

New Mexico suggests (Br. in Opp. 2, 11 n.10) that Texas's sovereign interests are not implicated by EPCWID's alleged failure to receive water because Texas itself does not have a contract with the United States for delivery of Project water. But as a sovereign State and a party to the Compact, Texas may defend its Compact apportionment, as this Court has long recognized in connection with water disputes.

See *Nebraska* v. *Wyoming*, 515 U.S. at 21-22. This Court has previously entertained an original action in which the apportionment and delivery of water in an interstate river were accomplished through Reclamation contracts with irrigation districts. See *Arizona* v. *California*, 373 U.S. at 580-585.

2. Furthermore, although the question whether Texas has properly invoked the Court's original jurisdiction is distinct from the question whether Texas will prevail on the merits, Texas's allegations of a Compact violation are credible.

a. Contrary to New Mexico's contention (Br. in Opp. 15-21), the equitable apportionment of the Rio Grande Basin did not end at Elephant Butte. The Compact states that it is intended to apportion the water of the Rio Grande from its headwaters in Colorado to Fort Quitman, Texas. Preamble, 53 Stat. 785. To accomplish that apportionment, the Compact requires Colorado to deliver a specific quantity of water to the New Mexico state line, and it requires New Mexico to deliver a specific quantity of water to Elephant Butte. Arts. III, IV, 53 Stat. 787-788. Once the water is delivered by New Mexico to Elephant Butte (*i.e.*, into "project storage," Art. I(k), 53 Stat. 786), it becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including delivery to Mexico." Art. I(*l*), 53 Stat. 786. Reclamation controls the releases for those uses described in Article I(*l*) pursuant to federal contracts and a treaty that were already in place when the Compact was signed.

Indeed, EBID and EPCWID agreed to freeze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte at 57% for

EBID and 43% for EPCWID on February 16, 1938—a month before the Compact was signed. App., *infra*, 1a-4a. Answering a letter from a lawyer for downstream Rio Grande interests who inquired why the Compact did not provide for a specific amount of water to be delivered to Texas, the Compact Commissioner for Texas explained that "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation" in which "the total area is 'frozen' at the figure representing the acreage now in cultivation." Douglas R. Littlefield, *Conflict on the Rio Grande* 213-214 (2008) (quoting Letter from Frank B. Clayton to Sawnie Smith (Oct. 4, 1938)). This indicates Texas's understanding at the time the Compact was signed that its apportionment of Rio Grande water was defined by the existing contracts with the Project.

If New Mexico's only obligation under the Compact were to deliver water to Elephant Butte, and if New Mexico were then free to allow depletions of the Project water supply available below Elephant Butte, then Texas bargained for little under the Compact. That view of the Compact is inconsistent with its basic purpose, which is to equitably apportion the water of the Rio Grande Basin—from its headwaters to Fort Quitman—among the three compacting States.

New Mexico's view of the Compact is also inconsistent with the requirement that New Mexico "deliver" a specific quantity of water to Elephant Butte. See Art. IV, 53 Stat. 788. "Delivery" is generally understood to mean "[t]he formal act of transferring something" or "the giving or yielding possession or

control of something to another." See *Black's Law Dictionary* 494 (9th ed. 2009); see also *Black's Law Dictionary* 349 (2d ed. 1910) (current edition when Compact was negotiated and signed; defining "delivery" in the context of "conveyancing" as "[t]he final and absolute transfer of a deed * * * in such manner that it cannot be recalled by the grantor"); *Fox* v. *Young*, 91 S.W.2d 857, 859 (Tex. Civ. App. 1936) ("A delivery may be said to have been made whenever, at the time and place * * * the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer."). When New Mexico "delivers" water to Elephant Butte under the Compact, it relinquishes control of the water to the Project. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the released water—and for "deliver[y] to Mexico." Art. I(*l*), 53 Stat. 786.

New Mexico's view of the Compact likewise is inconsistent with Reclamation law more generally, which provides that only entities having contracts with the United States may receive deliveries of water from a Reclamation project. See Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e); see also 43 U.S.C. 485h(c), (d) and (e); *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (stating that project water "is not there for the taking (by the landowner subject to state law), but for the giving by the United States") (citing *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977)). The require-

ment of a contract for project water includes seepage and return flows. See *Ide* v. *United States*, 263 U.S. 497, 505 (1924) (holding that a federal Reclamation project is entitled to seepage water for irrigation). Accordingly, once water is delivered by New Mexico, there is no apportionment of water under the Compact to New Mexico below Elephant Butte other than Project water delivered to EBID pursuant to a contract, and New Mexico may not allow the use of water downstream from Elephant Butte that intercepts or interferes with release and delivery of Project water. Because Texas water users are protected in this manner from unauthorized uses of water in New Mexico, it is irrelevant that New Mexico's promise in the interim Compact that it would not allow the water above or below Elephant Butte "to be impaired by new or increased diversion or storage within the limits of New Mexico," Art. XII, 46 Stat. 772, was not reiterated in those terms in the Compact.[2]

b. New Mexico contends (Br. in Opp. 12-13) that under Article XI of the Compact, a State may only request relief from this Court for a claim that one State has changed "the character or quality of the water, at the point of delivery, * * * to the injury of

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[2] In the past, New Mexico has taken inconsistent positions on the Compact's apportionment of water below Elephant Butte. See *City of El Paso* v. *Reynolds*, 563 F. Supp. 379, 382, 386 (D.N.M. 1983) (explaining that New Mexico argued that it could not allow the export of groundwater from southern New Mexico because the Compact "apportions the surface water of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related ground water," but stating that New Mexico had previously taken the position in *Texas* v. *New Mexico*, Original No. 9, that the Compact "does not apportion the Rio Grande between New Mexico and Texas").

another," 53 Stat. 790-791, and that Texas has not made such an allegation. That is incorrect.

Article XI provides that the Compact settles all controversies between New Mexico and Texas "relative to the quantity or quality of the water of the Rio Grande," and that "nothing [in the Compact] shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 790-791. That language does not prevent a State from seeking recourse in this Court on the ground that another State is failing to comply with its obligations under the Compact or is interfering with the complaining State's equitable apportionment.

Furthermore, the Compact does not define "character," but the disjunctive "or" in the phrase "character or quality" of water suggests that "character" refers to something other than water quality. The term could refer, for example, to the possessory status of the water, and New Mexico could be said to have changed the character of the water at the place of delivery by preventing the Project from controlling the water when it does so.

B. The Alternative Fora New Mexico Identifies Would Not Resolve The Parties' Dispute

New Mexico identifies two pending cases that it contends provide an adequate alternative forum to resolve Texas's claims. Neither case would provide Texas with the relief it seeks.

1. New Mexico first identifies (Br. in Opp. 24-27) *New Mexico* v. *United States*, No. 1:11-cv-691-JB-ACT (D.N.M.), as an alternative forum to resolve

Texas's claims. In that case, New Mexico and intervenor City of Las Cruces have sued the United States in federal district court seeking to void a settlement agreement (the 2008 Operating Agreement) among Reclamation, EBID, and EPCWID regarding the operation of the Project.

The 2008 Operating Agreement settled separate suits brought by EPCWID and EBID against Reclamation. EPCWID's suit alleged, *inter alia*, that EPCWID was not receiving its 43% of the Project's available water supply, and that Reclamation was failing to account for the adverse impact on Project deliveries caused by EBID's pumping of water in the Mesilla aquifer in New Mexico. *El Paso County Water Improvement Dist. No. 1* v. *Elephant Butte Irrigation Dist.*, 3:07-cv-00027-PRM Docket entry No. 2, paras. 14, 32 & p. 17 (W.D. Tex. Jan. 22, 2007).

Under the 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See U.S. Bureau of Reclamation, Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 4-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID. *Id.* at 13-14, 18. The effect of the Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in

Project efficiency caused by groundwater pumping in New Mexico. *Id.* at 4.

New Mexico contends (Br. in Opp. 25) that if the federal court in New Mexico upholds the 2008 Operating Agreement, "any interest Texas might have in the delivery of water from the Project will be vindicated." That is incorrect. The 2008 Operating Agreement protects Project deliveries to EPCWID and Mexico based on 1951-1978 hydrological conditions. Texas asserts that it is entitled to 43% of Project water based on hydrological conditions existing when the Compact was signed in 1938. Compl. para. 18.

Furthermore, the 2008 Operating Agreement does not prohibit New Mexico from allowing or authorizing groundwater pumping. Accordingly, particularly under drought conditions, there would likely come a point when uncapped groundwater pumping in New Mexico would reduce Project efficiency to a point where 43 percent of the available water could not be delivered to Texas, even if EBID forwent *all* Project deliveries. New Mexico's pending federal court action therefore would not definitively resolve Texas's claims.

2. New Mexico also identifies *New Mexico ex rel. State Engineer* v. *Elephant Butte Irrigation District*, No. CV-96-888 (N.M. 3d Dist.), a general water adjudication in New Mexico state court, as an alternative forum. In that adjudication, a New Mexico state court is determining rights to water of the Rio Grande below Elephant Butte. The United States has filed a claim to water for the Project, including the right to deliver at the Texas state line an amount of water sufficient to satisfy Project needs in Texas and obligations to Mexico. United States' Statement of Claim

for Water for the Rio Grande Project, CV-96-888 Docket entry (N.M. 3d Dist. Sept. 15, 2010), https://lrgadjudication.nmcourts.gov/index.php/overview/doc_download/568-united-states-statement-of-claim-for-water-for-teh-rio-grande-project.pdf.

New Mexico has taken the position in that general adjudication that the water right decreed for the Project may not recognize the United States' obligation to deliver water to EPCWID. N.M. Resp. in Opp. to the U.S. Mot. for Summ. J. 29 (May 24, 2013) (disputing that "in adjudicating water rights in New Mexico, the Court should grant the United States a water right for waters appropriated and used in Texas"), https://lrgadjudication.nmcourts.gov/index.php/overview/doc_download/566-state-of-new-mexico-s-response-in-opposition-to-the-united-states-motion-for-summary-judgment.pdf. If, as New Mexico contends, only intrastate water rights will be considered in the state adjudication, then the water adjudication cannot resolve the issue of Compact interpretation that Texas raises in its complaint.

Furthermore, Texas's Compact apportionment must be respected by New Mexico regardless of the claims of its water users to Rio Grande water under New Mexico law. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment of water in an interstate stream pursuant to a compact "is binding upon the citizens of each State and all water claimants"). The parties disagree about what amount of water, if any, is apportioned to Texas under the Compact. Although New Mexico apparently is of the view that Texas compacted for an apportionment of water that is subject to whatever limitations New Mexico law may place on

the Project's water right, that is a question for this Court, and not a New Mexico state court, to decide. See *West Virginia, ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State.").

C. Denying Texas Leave To File A Complaint Based On The Status Of The United States Would Be Premature

It would be premature at this stage to reject Texas's complaint based on the United States' possible status as a required party. Cf. Fed. R. Civ. P. 19; see, *e.g.*, *Idaho ex rel. Andrus* v. *Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (granting motion to file complaint and leaving open the question of indispensability of the United States, to be resolved "in the event the United States does not enter its appearance"). While the United States may, in fact, be determined to be a required party, the Court should not deny Texas leave to file its complaint on that basis at this juncture, if for no other reason than the United States may elect to intervene if the case goes forward.

II. BEFORE REFERRING THE MATTER TO A SPECIAL MASTER, THIS COURT SHOULD PROVIDE FOR RESOLUTION OF THRESHOLD LEGAL ISSUES

Upon granting leave to file a complaint, the Court typically directs the defendant to file an answer and then refers the matter to a Special Master to conduct appropriate proceedings. See, *e.g.*, *New Jersey* v. *New York*, 511 U.S. 1080 and 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987). In certain situations, however, this Court has resolved preliminary or potentially controlling legal issues before, or in lieu of, referring the case to a Special Master. See *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000);

United States v. *Alaska*, 499 U.S. 946 (1991); 501 U.S. 1275 (1991); 503 U.S. 569 (1992); *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988); *United States* v. *California*, 375 U.S. 927 (1963); *United States* v. *Louisiana*, 338 U.S. 806 (1949). This case is one in which the latter course might be followed.

Texas and New Mexico disagree over whether the Compact permits New Mexico to allow water users to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte, beyond what is authorized under the Project. If this action were governed by the Federal Rules of Civil Procedure, New Mexico would be entitled to test its theory by moving to dismiss Texas's complaint for failure to state a claim on which relief may be granted. See Fed. R. Civ. P. 12(b)(6). Although the Federal Rules are not strictly applicable here, they provide a guide to the Court's proceedings. See Sup. Ct. R. 17.2. The Court may wish to apply the procedure suggested by Rule 12(b)(6) to facilitate the disposition of this action. See, *e.g.*, *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999).

Because the Court uses the Federal Rules of Civil Procedure as merely a guide to the conduct of original actions, it may tailor appropriate procedures to facilitate its decision-making process. See *United States* v. *Alaska*, 501 U.S. 1248 (1991); 501 U.S. 1275. The United States suggests that the Court may wish to grant Texas leave to file its complaint and simultaneously grant New Mexico leave to file a motion, in the nature of a motion under Rule 12(b)(6), with respect to the issues of compact interpretation that New Mexico deems dispositive. If the Court follows that recommendation, the United States suggests that the Court

may wish to set a schedule for the motion and supporting brief, opposition, and reply. The Court would retain the option of referring the motion to dismiss to a Special Master in the first instance once briefing is completed, if that course seemed advisable at that time. See *Montana* v. *Wyoming*, 129 S. Ct. 480 (2008); 552 U.S. 1175 (2008).

CONCLUSION

Texas should be granted leave to file its complaint. New Mexico should be invited to file a motion in the nature of a motion to dismiss the complaint.

Respectfully submitted.

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DECEMBER 2013

COPY 2-16-38

CONTRACT

This contract made and entered into by and between the Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas, pursuant to resolutions of the Board of Directors of the respective Districts, authorizing the same, WITNESSETH THAT:

WHEREAS, it is expedient that the acreage within each irrigation District which is to be irrigated should be cushioned by allowing the distribution of water to a small excess of acreage over and above that allotted to the two Districts under the Rio Grande New Mexico-Texas Reclamation Project, to the end that annual variations, within narrow limits, shall be permitted, and so that, each year, there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres upon which construction and operation and maintenance charges may be levied;

THEREFORE, it is mutually agreed that either District may increase the acreage to be irrigated and to be subject to construction charges, not to exceed three (3%) per cent of the present authorized acreage in each District, that is to say, Elephant Butte Irrigation District, having authorized acreage of 88,000 acres, may increase such acreage to the extent of three (3%) per cent thereof, amounting to not to exceed 2,640 acres; that El Paso County Water Improvement District No. 1, having a present authorized acreage of 67,000

acres, may increase such acreage to three (3%) per cent thereof, that is, not to exceed 2,010 acres, said additional lands, in any case, to be within the limits of the present irrigation Districts or any future extensions thereof.

It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

It is further agreed and understood that the operation and maintenance costs of the project works (exclusive of the storage and power development) for the calendar year of 1938 and thereafter shall be distributed between the two Districts in the same manner as similar costs were distributed for the calendar year 1937, and that the same ratios for the two Districts, respectively, that were applied to said costs for that year common to both Districts shall be used in 1938 and subsequent years.

This contract to be effective only during the period when the proposed contracts under Public No. 249, Seventy-fifth Congress, 1st Session, between, (1) the United States and Elephant Butte Irrigation District and (2) the United States and El Paso County Water Improvement District No. 1 are in force, and if either or both of said contracts should terminate after both have become effective, this contract is also to terminate.

IN TESTIMONY WHEREOF, the parties hereunto have caused the same to be signed by the Presidents of their respective Boards of Directors, and attested by the Secretary with the seal of said corporation, this 16th day of February A.D. 1938.

THE ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO.

By (Signed) Arthur Starr
President

(SEAL)

ATTEST: (Signed) Jose R. Lucero
Secretary, Elephant Butte
Irrigation District.

EL PASO COUNTRY WATER IMPROVEMENT DISTRICT DISTRICT NO. 1 OF TEXAS

By (Signed) T.D. Porcher
President

(SEAL)

ATTEST: (Signed) Idus T. Gillett
Secretary, El Paso County Water
Improvement District No. 1.

APPROVED THIS 11TH DAY OF APR., A.D. 1938

(Signed) Oscar L. Chapman
ASSISTANT SECRETARY
OF THE INTERIOR

RECORD AND BRIEFS

No. 22O141, Original

Supreme Court, U.S.
FILED
DEC 31 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave
To File Bill Of Complaint

SUPPLEMENTAL BRIEF IN OPPOSITION

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December 27, 2013

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Río Grande Project Act of February 25, 1905, ch. 789, 33 Stat. 814 ..... 1, 2

COMES NOW the State of Colorado by and through counsel pursuant to invitation of the Court to submit this Supplemental Brief in Opposition to the Motion for Leave to File Bill of Complaint ("Motion") submitted by the State of Texas in this matter, No. 141, Original.

ARGUMENT

The United States has filed a brief at the invitation of the Court in which it suggests the Court accept the Complaint, allow New Mexico to file a motion in the nature of a motion to dismiss, and retain the case for disposition of threshold legal issues before possibly assigning a Special Master.

Colorado does not agree that the Complaint reasonably alleges a violation of the Río Grande Compact ("Compact"). 53 Stat. 785, codified at C.R.S. § 37-66-101 (2012). The United States acknowledges that the Compact requires New Mexico to deliver water to Elephant Butte Reservoir. Brief for the United States as Amicus Curiae at 1, 7 ("U.S. Brief"). The Bureau of Reclamation constructed Elephant Butte Reservoir as part of the Río Grande Project ("Project"). Río Grande Project Act of February 25, 1905, ch. 789, 33 Stat. 814. U.S. Brief at 4. The United States asserts that the Project operates with an appropriated water right in New Mexico. *Id.* Further, the Project allocates water by contract to Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EPCWID"). U.S. Brief at

4-5. It also recognizes that the Compact does not contain any terms allocating water between EBID and EPCWID. U.S. Brief at 14. Colorado is not now expressing a view on whether the Complaint adequately alleges a controversy between the states, but it cannot see an alleged injury based on the terms of the Compact. See, U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a).

Moreover, Colorado has concerns with some of the statements made by the United States about the Compact and its potential relationship with the Project. Colorado does not view the invitation to file a supplemental brief as an offer to argue all the relevant points of the Compact or the Complaint. Rather, Colorado urges the Court to recognize that the views of the United States are not determinative of the Compact.

If the Court accepts the Complaint, Colorado agrees with the suggestion that this Court should retain the matter in order to decide threshold legal issues. As the home of nine interstate water compacts, Colorado believes that litigation regarding compacts should be narrow in scope. Because the nature of the allegations remain unclear, it is important to Colorado to clarify the extent to which the Complaint is based on the Compact or other interstate controversy. Keeping the matter before this Court would help to focus the nature of Texas' dispute and save substantial resources of the states, the United States, and this Court by eliminating consideration of nonessential issues.

Colorado requests that it be granted the ability to fully participate in any motion in the nature of a

motion to dismiss. Because Colorado is a party to the Compact, it has a genuine interest in its interpretation. The United States has made several statements in its brief that concern Colorado and may adversely impact Colorado's rights and obligations under the Compact. Participation will ensure that Colorado's position, which is not adequately represented by any other party, is heard.

CONCLUSION

Because the Complaint remains ill-defined, if the Court accepts the Complaint, Colorado agrees that this Court should retain this matter for disposition of a motion in the nature of a motion to dismiss before assigning a Special Master. Colorado requests leave to fully participate in a motion to dismiss. Until Texas clearly asserts a violation of the terms of the Río Grande Compact, Colorado does not support Texas' Motion on the basis of a compact controversy.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

On Motion For Leave To File Complaint

NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The State of New Mexico moves for leave to file the attached Supplemental Brief in response to the Brief for the United States as Amicus Curiae ("U.S. Brief").

As grounds therefor, New Mexico states as follows:

1. The Court's consideration of the pending Motion for Leave to File Complaint by the State of Texas may benefit from clarification of certain issues discussed in the U.S. Brief, submitted after New Mexico's last filing; and

2. Allowing New Mexico to file a Supplemental Brief will not delay consideration by the Court of the Texas Motion for Leave to File Complaint.

Respectfully submitted,

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December 2013

No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

On Motion For Leave To File Complaint

SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

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The State of New Mexico files this Supplemental Brief in response to the Brief for the United States as Amicus Curiae ("U.S. Br."). The Court should deny Texas' Motion for Leave to File because a preferable alternative forum exists in which the issues Texas raises can be resolved.

SUMMARY OF ARGUMENT

The central issue raised in Texas' Complaint is whether Texas is receiving its share of water from the Rio Grande. Texas alleges that New Mexico water users are improperly intercepting (i.e., diverting or pumping) surface water and groundwater within New Mexico that reduces Rio Grande Project allocations to the Texas Project beneficiary, El Paso County Water Improvement District No. 1 ("EPCWID"). In accordance with the longstanding principle that the Court's original jurisdiction is sparingly granted, Texas' Motion for Leave should be denied because there is an alternative forum to resolve the issues Texas' Complaint presents. Denying the motion would promote the proper functioning of the federal judicial system, allow the issues to be resolved in the courts best suited to trials, and preserve this Court's customary appellate jurisdiction.

ARGUMENT

I. THIS CASE IS NOT APPROPRIATE FOR THE COURT'S ORIGINAL JURISDICTION BECAUSE A PREFERABLE ALTERNATIVE FORUM EXISTS

The Court has repeatedly affirmed a longstanding "philosophy" that its original jurisdiction "should be invoked sparingly" and is "obligatory only in appropriate cases." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972); see also *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). This philosophy has guided the Court's exercise of discretion not to accept original actions in cases within both the Court's nonexclusive original jurisdiction, as well as its exclusive original jurisdiction in actions between two States. See, *e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Accordingly, the Court's evaluation of whether a given case is appropriate for original jurisdiction inquires as to the "availability of an alternative forum in which the issue[s] tendered can be resolved." *Id.* The inquiry is not whether there is another *case* in which the same issues are being litigated, though there is such a case here, see, *e.g.*, *Arizona v. New Mexico*, 425 U.S. at 796-97; rather, it asks whether there is another *forum* in which those issues *can be* raised and resolved. Thus, if the issues posed in an original complaint "can be resolved effectively by other litigation in other courts, *if need be by other parties* . . ., discretionary denials of original jurisdiction seem appropriate." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction* § 4053 (3d ed. 2008)

(emphasis added). In this case, the United States district courts provide an alternative forum.

A. The Nature Of Texas' Claim

Texas claims it has not received its share of Compact water because of increased surface water diversions and groundwater pumping by New Mexico water users below Elephant Butte Reservoir. See Complaint at ¶¶ 18, 21. Both Texas and the United States view the water New Mexico is obligated to deliver under the Compact as Rio Grande Project Water delivered to the Texas Project beneficiary, EPCWID, pursuant to contracts with Reclamation.[1]

> Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements.

Complaint ¶ 4.

> When New Mexico "delivers" water to Elephant Butte under the Compact, it relinquishes control of the water to the Project.

---

[1] All of the water to which Texas is entitled is stored in the Project, but not all water in the Project is dedicated for Texas. The Project Storage also contains water for Elephant Butte Irrigation District ("EBID"), imported water from the Colorado River basin, Compact credit water, and water dedicated by treaty for Mexico.

> The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries. . . .

U.S. Br. 15 (emphasis in original).

It follows that the interest asserted by Texas in such water is coextensive with the interest of EPCWID under contracts with Reclamation. That is, all of the water Texas is entitled to under the Compact is destined for delivery to EPCWID. As New Mexico explained in its earlier brief, "Texas' Complaint does not assert any right or interest that could result in the delivery of water to any entity or person other than EPCWID." N.M. Br. 25; see also U.S. Br. 14 (noting "Texas' understanding at the time the Compact was signed [was] that its apportionment of Rio Grande water was defined by the existing contracts with the Project"); Complaint ¶ 8 ("[EPCWID], a political subdivision of the State of Texas, is the Rio Grande Project beneficiary of the water from the Rio Grande Project").

In sum, the essential issue Texas' Complaint raises is whether EPCWID, a political subdivision of Texas, and by extension the State of Texas, is receiving its share of Project water.

B. The United States District Courts Provide An Alternative Forum Warranting Denial Of Texas' Motion For Leave

The United States focuses exclusively on the two existing suits, arguing they are not currently

presented in a way that fully addresses the issues raised in Texas' Complaint. U.S. Br. 19. But that is not the question; rather, as noted above, the Court considers the availability of another *forum* in which the issues *can be* raised. *E.g.*, *Arizona v. New Mexico*, 425 U.S. at 797.

Given the issues Texas raises in its Complaint, the United States district courts provide an alternative forum warranting denial of Texas' motion for leave. Pursuant to the Reclamation Act, 43 U.S.C. § 390uu, EPCWID, as a contract holder, can bring an action in federal district court against Reclamation and EBID asserting it is not receiving its allocation of Project water. In fact, EPCWID filed just such a case in 2007. See *EPCWID v. EBID and the United States of America*, Case No. 07-CV-00027 (W.D. Tex., filed Jan. 22, 2007) ("*EPCWID v. EBID*"). In that case, EPCWID sued EBID and the United States claiming, *inter alia*, EPCWID was entitled to additional Project water deliveries as an offset for groundwater pumping in New Mexico:[2]

---

[2] EPCWID's contract with the United States provides the enforceable delivery obligations:

> The United States shall allocate legally available stored project water among Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1 and the Republic of Mexico in accordance with the Rio Grande Project Act of 1905, all applicable Federal Reclamation Laws, the Convention with Mexico for the Upper Rio Grande proclaimed in 1907, all

(Continued on following page)

> By its failure to limit or account for such groundwater depletions, the United States, through the Bureau of Reclamation, has failed to act in accordance with its duties to EPCWID under the EPCWID Contract and the Stipulated Contract .... Consequently, the water users of EPCWID suffer the loss of use of Project water to which they are entitled. Under the EPCWID Contract, the Stipulated Contract, and Federal Reclamation Law, the United States has an affirmative duty to take such action as necessary to assure that depletions of Project water by groundwater withdrawal in EBID is accounted for as Project water delivered to EBID.

EPCWID v. EBID, Complaint ¶ 32. The case was dismissed after execution of a 2008 Operating Agreement by EBID, EPCWID and Reclamation. The 2007 case illustrates that the federal district courts provide a forum in which the issues presented in Texas' Complaint can be resolved outside of this Court's original jurisdiction.

The presence of an alternative forum is further demonstrated by the pending litigation in federal district court over distribution of Rio Grande Project water. See *New Mexico v. United States*, Case No. 11-cv-00691 (D.N.M., filed August 8, 2011); N.M. Br.

> vested rights of the District under all applicable State and Federal law, court decisions, and this contract.

EPCWID v. EBID, Complaint ¶ 17.

24-27. That suit concerns the 2008 Operating Agreement for the Rio Grande Project.[3] Like the case Texas proposes in this Court, the issues raised in the existing district court case require a determination of the amount of water to which EPCWID, and by extension, Texas, is entitled. To the extent the United States or EPCWID believe the existing case may not squarely present the issues asserted in Texas' Complaint, additional claims against either the U.S. or New Mexico could be asserted.

The pending case illustrates an additional reason the federal district court is a preferable forum. An action in federal district court is better suited to a more complete resolution of the myriad complex issues surrounding the allocation of Project waters. The United States and its interests and obligations under various contracts and federal laws are central in any case concerning Project allocations. The United States recognizes as much by agreeing that it may be a required party to this case. U.S. Br. 21. Since jurisdiction in an original action cannot be exercised over the United States without its consent, the federal district court provides a preferable forum in that it allows for the resolution of all relevant and interrelated issues. See 43 U.S.C. § 390uu and 5 U.S.C. § 702 (waiving sovereign immunity for a suit in federal district court under the Reclamation Act and

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[3] New Mexico has challenged the 2008 Operating Agreement as over-allocating water to Texas and authorizing new Project operations that violate federal laws.

Administrative Procedure Act); see also Section II, *infra*.[4]

Although overlooked by the United States, *Arizona v. New Mexico*, 425 U.S. 794 is squarely on point. In that case, Arizona sought leave to file an original action against New Mexico challenging the constitutionality of a New Mexico tax imposed on electricity generated in New Mexico but sold to customers in Arizona. *Id.* at 794-95. Arizona's complaint asserted interests both as a direct consumer of electricity subject to the tax, and in its capacity as *parens patriae* on behalf of its citizens who purchased this electricity. *Id.* at 796. The Court denied Arizona's motion for leave based on the existence of an alternative forum. *Id.* at 797. Specifically, three Arizona utilities that operated facilities in New Mexico and retailed energy through interstate lines to customers in Arizona declined to pay the New Mexico tax and filed a declaratory judgment suit in New Mexico state district court. *Id.* at 796. The Court found that the New Mexico state district court "provide[d] an appropriate forum in which the issues tendered [by Arizona] may be litigated." *Id.* at 797. The Court explained that

> [i]f on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is

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[4] New Mexico reserves the right to seek leave to file a counterclaim in this action to raise appropriate issues under federal law should the Court grant Texas' Motion for Leave.

> held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. § 1257(2).

Id.

For the same reasons the state district court provided an alternative forum warranting denial of Arizona's motion for leave, the federal district courts provide an alternative forum warranting denial of Texas' motion for leave in this case. Like the utilities in *Arizona v. New Mexico*, EPCWID can assert the issues presented in Texas' Complaint in an action in federal district court. Reclamation and EBID could be joined in such a case. See *New Mexico v. United States*, No. 11-cv-00691. If necessary, that action can ultimately reach the Court on certiorari and thereby fully vindicate Texas' interests under the Compact.

Furthermore, the existence of a compact claim does not require exercise of original jurisdiction. Congressionally-recognized interstate compacts are federal law. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). Federal district courts can interpret and apply interstate compacts. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) (whether a corporation formed by interstate compact was entitled to Eleventh Amendment immunity), *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (whether a lack of formal Congressional approval invalidated an interstate compact); *NYSA-ILA Vacation and Holiday Fund v. Waterfront Comm'n of New York*

Harbor, 732 F.2d 292 (2d Cir. 1984) (whether the procedures of a commission formed by interstate compact were preempted by ERISA). Nor does the fact that Texas may not be a party in a federal district court action require exercise of the Court's original jurisdiction. See *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) (absence of one state in federal district court proceeding was "not [a] determinative consideration[ ]"); Wright & Miller, § 4053.

Finally, Texas' and the United States' concerns, regarding the possible need to address groundwater pumping effects on the Project, can be addressed by the federal district court, if necessary. Surface water and groundwater are managed conjunctively in New Mexico under the prior appropriation doctrine. See N.M. Const. art. XVI; N.M.S.A. 1978, §§ 72-5-1 *et seq.*, 72-12-1 *et seq.*; *City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1963) (groundwater will be administered like surface water except as required by the subterranean nature of groundwater); 19.25.13.1 to .50 NMAC (State Engineer may regulate water rights without waiting for full adjudication by the courts); *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012) (same). Consequently, Reclamation can require administration of groundwater pumping to protect senior surface water

rights.[5] If necessary, EPCWID can require Reclamation to deliver the water to which it is entitled.

II. IF THE COURT GRANTS TEXAS' MOTION, NEW MEXICO REQUESTS THE OPPORTUNITY TO FILE A MOTION TO DISMISS

Before referring the matter to a Special Master, this Court should resolve the threshold legal issue of whether the United States is an indispensable party. The United States acknowledges it "may, in fact, be determined to be a required party" to the case Texas proposes. U.S. Br. 21. Nonetheless, the United States argues "[i]t would be premature at this stage to reject Texas's complaint based on the United States'

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[5] A separate remedy exists to address Texas' claims that groundwater pumping in New Mexico is preventing Texas from receiving its share of Compact water. As explained in New Mexico's opening brief, the United States holds a New Mexico water right for the Project, the elements of which are being determined in the ongoing stream system adjudication in New Mexico state court. 43 U.S.C. § 666 (McCarran Amendment) (giving consent to join the U.S. as a defendant in any suit for adjudication of rights to the use of water **and for the administration of such rights**). If other New Mexico water users are depleting or impairing the Project's water right, there are remedies under New Mexico law, incorporated into Section 8 of the Reclamation Act (codified at 43 U.S.C. §§ 372, 383) that protect the U.S.'s Project water right. *Nebraska v. Wyoming*, 325 U.S. 589, 639-40 (1945) (administration of water in federal reservoir is subject to Wyoming law under Section 8 of the Reclamation Act). Those mechanisms, in turn, would keep Texas and EPCWID whole without the need to invoke this Court's original jurisdiction.

possible status as a required party." *Id.* According to the United States, this is so because "the United States may elect to intervene if the case goes forward." *Id.*

"[I]n original cases," the Court will, "where feasible . . . dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). The United States has previously recognized that "[i]nterstate water disputes pose complex trial-management problems once they proceed past the pleading stage." Brief for the United States as Amicus Curiae, *Montana v. Wyoming & North Dakota*, No. 137 Orig., at 19 (Jan. 1, 2008), available at www.stanford.edu/dept/law/mvn ("Montana Invitation Brief"). For that reason, the United States has argued that "an interstate water dispute . . . is particularly likely to benefit from an early judicial determination narrowing or even resolving the contested legal issues before the parties engage in fact development." Montana Invitation Br. 21.

In this case, the United States recommends that the Court resolve threshold issues before referring the matter to a Special Master. If the case proceeds, one of the issues that should be determined at the initial stage is the indispensability of the United States. *Arizona v. California*, 298 U.S. 558, 572 (1936) ("A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party."). If the Court is inclined to grant Texas' Motion for Leave to File, New

Mexico requests that the Court set a schedule for resolution of this issue, including whether the United States intends to intervene. Resolution of this issue prior to lengthy proceedings before a Special Master will promote judicial efficiency and prevent wasted resources associated with litigating a case that may ultimately be dismissed for failure to join the United States.[6]

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[6] In addition to briefing the issue of indispensability, if the Court grants Texas' Motion for Leave, New Mexico welcomes the U.S.'s suggestion that it be permitted to file a motion to dismiss to address threshold legal issues.

CONCLUSION

Texas' Motion for Leave to File Complaint should be denied.

Respectfully submitted,

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December 2013

RECORD AND BRIEFS

No. 220141, Original

Supreme Court, U.S.
FILED
DEC 31 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

**On Motion For Leave
To File Bill Of Complaint**

SUPPLEMENTAL BRIEF IN OPPOSITION

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December 27, 2013

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Río Grande Project Act of February 25, 1905, ch. 789, 33 Stat. 814 ..... 1, 2

COMES NOW the State of Colorado by and through counsel pursuant to invitation of the Court to submit this Supplemental Brief in Opposition to the Motion for Leave to File Bill of Complaint ("Motion") submitted by the State of Texas in this matter, No. 141, Original.

ARGUMENT

The United States has filed a brief at the invitation of the Court in which it suggests the Court accept the Complaint, allow New Mexico to file a motion in the nature of a motion to dismiss, and retain the case for disposition of threshold legal issues before possibly assigning a Special Master.

Colorado does not agree that the Complaint reasonably alleges a violation of the Río Grande Compact ("Compact"). 53 Stat. 785, codified at C.R.S. § 37-66-101 (2012). The United States acknowledges that the Compact requires New Mexico to deliver water to Elephant Butte Reservoir. Brief for the United States as Amicus Curiae at 1, 7 ("U.S. Brief"). The Bureau of Reclamation constructed Elephant Butte Reservoir as part of the Río Grande Project ("Project"). Río Grande Project Act of February 25, 1905, ch. 789, 33 Stat. 814. U.S. Brief at 4. The United States asserts that the Project operates with an appropriated water right in New Mexico. *Id.* Further, the Project allocates water by contract to Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EPCWID"). U.S. Brief at

4-5. It also recognizes that the Compact does not contain any terms allocating water between EBID and EPCWID. U.S. Brief at 14. Colorado is not now expressing a view on whether the Complaint adequately alleges a controversy between the states, but it cannot see an alleged injury based on the terms of the Compact. See, U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a).

Moreover, Colorado has concerns with some of the statements made by the United States about the Compact and its potential relationship with the Project. Colorado does not view the invitation to file a supplemental brief as an offer to argue all the relevant points of the Compact or the Complaint. Rather, Colorado urges the Court to recognize that the views of the United States are not determinative of the Compact.

If the Court accepts the Complaint, Colorado agrees with the suggestion that this Court should retain the matter in order to decide threshold legal issues. As the home of nine interstate water compacts, Colorado believes that litigation regarding compacts should be narrow in scope. Because the nature of the allegations remain unclear, it is important to Colorado to clarify the extent to which the Complaint is based on the Compact or other interstate controversy. Keeping the matter before this Court would help to focus the nature of Texas' dispute and save substantial resources of the states, the United States, and this Court by eliminating consideration of nonessential issues.

Colorado requests that it be granted the ability to fully participate in any motion in the nature of a

motion to dismiss. Because Colorado is a party to the Compact, it has a genuine interest in its interpretation. The United States has made several statements in its brief that concern Colorado and may adversely impact Colorado's rights and obligations under the Compact. Participation will ensure that Colorado's position, which is not adequately represented by any other party, is heard.

CONCLUSION

Because the Complaint remains ill-defined, if the Court accepts the Complaint, Colorado agrees that this Court should retain this matter for disposition of a motion in the nature of a motion to dismiss before assigning a Special Master. Colorado requests leave to fully participate in a motion to dismiss. Until Texas clearly asserts a violation of the terms of the Río Grande Compact, Colorado does not support Texas' Motion on the basis of a compact controversy.

Respectfully submitted,

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December 27, 2013

RECORD AND BRIEFS

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SUPREME COURT, U.S.

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to File Complaint

TEXAS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF IN RESPONSE TO NEW MEXICO'S SUPPLEMENTAL BRIEF

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January 2014

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No. 22O141, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

TEXAS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The State of Texas hereby respectfully moves for leave to file the attached Supplemental Brief in response to New Mexico's Supplemental Brief.

In support of its motion, Texas asserts as follows:

1. No Supreme Court rule specifically references supplemental briefs in original jurisdiction actions, but in other actions supplemental briefs may be filed to call attention to an "intervening matter not available at the time of the party's last filing" and such a brief "shall be

restricted to new matter." *See* Supreme Court Rule 15.8. This response to New Mexico's supplemental brief is warranted because while New Mexico's brief is largely repetitive of arguments made in its initial opposition brief, it may also contain new matter submitted after Texas' filed its Reply Brief. Additionally, the Court's consideration of Texas' pending Motion for Leave to File Complaint may benefit from Texas' response to the points raised in New Mexico's supplemental brief.[1]

2. Allowing Texas to file this Supplemental Brief will not delay the Court's consideration of Texas' Motion for Leave to File Complaint.

Respectfully submitted,

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January 2014

[1] To the extent the Court treats New Mexico's Motion for Leave to File Supplemental Brief as a motion pursuant to Supreme Court Rule 21, Texas requests that the Court consider this brief as a response to such a motion pursuant to Supreme Court Rule 21.4.

No. 22O141, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

TEXAS' SUPPLEMENTAL BRIEF IN RESPONSE TO NEW MEXICO'S SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

New Mexico does not directly respond to specific assertions or any new matters raised in the Brief of the United States as Amicus Curiae (U.S. Br.). Instead, New Mexico exploits this second opportunity for briefing to simply recast its prior arguments in a different light. In particular, New Mexico realleges, as it did in its initial Brief in Opposition (N.M. Opp. Br.), that there is an alternative forum to resolve the issues presented in Texas' Complaint. (N.M. Opp. Br. at 2-3, 22-31.) That position remains incorrect. Only this Court can vindicate Texas' interstate Compact claims against New Mexico and enforce the provisions of the Rio Grande Compact. New Mexico attempts to trivialize the nature of the dispute between it and Texas by asserting that the dispute merely involves a Reclamation contract to which neither New Mexico nor Texas are parties. In fact, the Complaint that Texas seeks to file is one that raises serious and significant issues related to New Mexico's breach of its Rio Grande Compact obligations.

ARGUMENT

I. New Mexico Lacks Grounds to File a Supplemental Brief

The Supreme Court Rules do not explicitly provide an opportunity for parties to file supplemental briefs in original jurisdiction actions. Supreme Court Rule 15.8, applicable to petitions for

certiorari, however, provides that "[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing" and such a brief "shall be restricted to new matter . . . ." Rule 15.8.

For the most part New Mexico's Supplemental Brief (N.M. Supp. Br.) is merely a second attempt at opposing Texas' Motion for Leave to File Complaint. The first four pages of New Mexico's brief do not even purport to have anything to do with the United States' amicus brief and instead directly address Texas' underlying motion. The balance of New Mexico's brief, while nominally in response to the United States' brief, in fact, presents arguments on the merits of Texas' Motion for Leave to File Complaint that New Mexico previously raised or could have raised in its original opposition brief.[1] No Court rule provides the parties an occasion to reargue positions or raise matters that could have been briefed at the time of original briefing. New Mexico attempts to overcome this limitation by denominating its Supplemental Brief as a response

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[1] In contrast, the State of Colorado's Supplemental Brief in Opposition directly addresses issues apparently found in the United States' amicus brief. However, none of Colorado's assertions are relevant to the question of whether this Court should grant Texas' Motion for Leave to File Complaint. Accordingly, Colorado's supplemental brief does not warrant a response.

to the United States' amicus brief. In fact, New Mexico merely reargues the positions it raised or should have raised in its original opposition brief. Accordingly, the Court should not consider New Mexico's supplemental brief.

II. The Interstate Compact Interpretation and Enforcement Issues Tendered by Texas Cannot Be Resolved in the District Courts or Any Other Alternative Forum

In its current brief, New Mexico attempts to redefine Texas' Complaint as one that involves a simple contract issue involving the El Paso County Water Improvement District No. 1 (EPCWID) and the United States, as opposed to the actual and immediate interstate Compact dispute between New Mexico and Texas. The Texas Complaint, however, focuses on Rio Grande Compact violations, and not violations of Reclamation law or provisions of a contract to which neither Texas nor New Mexico is a party.

Texas' sovereign rights to waters of the Rio Grande are provided for by the Rio Grande Compact, and are not defined by a contract to which it is not a party. Water apportioned by the Compact to Texas is allocated, in Texas, pursuant to Texas state law and, in some cases, Federal law, to parties in Texas. In fact, parties other than EPCWID receive allocations of water apportioned to Texas by the Compact. One example of this, and completely ignored by New Mexico, is amicus Hudspeth County

Conservation District and Reclamation District No. 1 (Hudspeth). [2] Various other Certificates of Adjudication allocate to entities within Texas the waters of the Rio Grande that have been apportioned to Texas by the Compact.[3] The United States has also pointed out that Texas' claim to waters of the Rio Grande is broader than EPCWID's interest. U.S. Br. at 19.

Accepting New Mexico's argument would lead to a conclusion that somehow Texas' sovereign rights are coextensive with the Rio Grande Reclamation Project and related contracts to which it is not even a party. However, while the Project is clearly relevant to the Compact, it hardly defines Texas' rights. If it did, then the 1938 Compact would have been superfluous, and the 1906 authorization of the Rio Grande Project would have alone been sufficient to define Texas' rights on the Rio Grande.

New Mexico asserts this faulty premise for the purpose of rearguing that alternative fora exist to resolve the dispute raised by Texas' Complaint. That position remains incorrect. *See* Reply Brief of the State of Texas at 9-12; U.S. Br. at 10-12, 17-21. In

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[2] *See* Amicus Brief of Hudspeth at 8-10 (explaining Hudspeth's right to divert 27,000 acre-feet per year from the Rio Grande as recognized and set forth in Certificate of Adjudication No. 23-5944, and Hudspeth's authorization to use up to 151,902 acre-feet per year of Rio Grande Project water pursuant to its Warren Act Contract with the United States).

[3] *See, e.g.*, Appendix to EPCWID's amicus brief, which contains its Certificate of Adjudication No. 23-5940.

addition, and contrary to New Mexico's contention, this Court's denial of jurisdiction in this case would not "promote the proper functioning of the federal judicial system" (N.M. Opp. Br. at 1) but would simply leave Texas without a forum in which to resolve the serious Compact claims raised in its Complaint.

Even if New Mexico's faulty premise were correct, the district courts would still not be an alternative forum for resolution of Texas' dispute with New Mexico. Relying on 43 U.S.C. § 390uu, New Mexico argues that EPCWID could bring a direct suit against the United States in district court seeking to enforce its 1938 contract.[4] But litigation initiated by EPCWID, a local government entity, does not aid the State of Texas, at all. Texas is not a party to EPCWID's 1938 contract with the United States and, more importantly, Texas here seeks relief pursuant to its rights under the Compact and not pursuant to EPCWID's 1938 or any other contract with Reclamation. Thus, the limited waiver of sovereign immunity in 390uu would not apply to Texas' claim.[5]

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[4] Whether the limited waiver of sovereign immunity in 390uu is broad enough to cover such a suit is debatable at best. *See Orff v. United States*, 545 U.S. 596, 602 (2005) ("[Section 390uu] does not permit a plaintiff to sue the United States alone.").

[5] New Mexico also asserts that the existence of a compact claim does not require the exercise of original jurisdiction, because federal district courts may interpret interstate compacts. N.M. Supp. Br. at 9-10. None of the cases cited by New Mexico, in

Footnote continued on following page.

Finally, and perhaps most importantly, Texas cannot sue New Mexico in any forum other than this Court. United States Constitution, Article III, Section 2, Clause 2; *California v. Arizona*, 440 U.S. 59, 61-63 (1979) (citing 28 U.S.C. § 1251(a)(1)); *see also Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) ("the description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court"). By permitting unlimited groundwater pumping below Elephant Butte Reservoir in New Mexico in derogation of its Compact obligations, it is the State of New Mexico, and not the United States, Elephant Butte Irrigation District or some other entity that has caused and continues to cause damage to Texas. Far from allowing the "proper functioning of the federal jurisdictional system," a failure by this Court to exercise its jurisdiction will not resolve this dispute but, at best, will foment extensive and inappropriate collateral litigation and exacerbate the real, existing and ongoing dispute between Texas and New Mexico.

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which lower courts interpreted legal issues related to interstate compacts, involve controversies between states. As a consequence, none of those cases are, at all, relevant to the instant situation.

CONCLUSION

Based upon the foregoing, New Mexico's supplemental brief should be disregarded, and the State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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January 2014

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against New Mexico and Colorado and invited New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the complaint, Texas seeks declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, and damages. Compl. 15-16.

The United States moves for leave to intervene as a plaintiff in this action. Intervention of the United States is appropriate where "distinctively federal interests, best presented by the United States itself, are at stake." *Maryland* v. *Louisiana*, 451 U.S. 725, 745

n.21 (1981). The United States has several distinct interests in this dispute. The parties' dispute concerns water released by the Rio Grande Project (Project), a Bureau of Reclamation project that the Department of the Interior operates, including by setting the diversion allocations for water users who have contracts for delivery of Project water. The Court's interpretation of the parties' rights and obligations under the Compact would affect how the Bureau of Reclamation calculates those diversion allocations. The United States' interest in how the Project is operated is a distinctively federal interest that is best presented by the United States.

The United States also has a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries or for delivery to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953.

The United States' proposed complaint in intervention is appended to this motion. The basis for this motion is explained more fully in the memorandum that then follows.

Respectfully submitted.

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FEBRUARY 2014

In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

COMPLAINT IN INTERVENTION

1. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. 1251(a).

2. The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas.

3. In 1905, Congress authorized construction of a Bureau of Reclamation (Reclamation) project known as the Rio Grande Project (Project) to provide a reliable irrigation system for southern New Mexico and western Texas. The construction of Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Elephant Butte Reservoir is

in New Mexico, approximately 105 miles north of the Texas state line. It is a federally owned Reclamation facility.

4. On March 18, 1938, Colorado, New Mexico, and Texas signed the Rio Grande Compact (Compact). A representative of the United States participated in the negotiation of the Compact, and Congress approved the Compact in the Act of May 31, 1939, ch. 155, 53 Stat. 785.

5. The preamble to the Compact states that Colorado, New Mexico, and Texas entered into the Compact "for the purpose of effecting an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." 53 Stat. 785.

6. Article IV of the Compact requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. In 1948, the Rio Grande Compact Commission changed the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir.

7. Article I(k) of the Compact defines "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project." 53 Stat. 786. Article I(*l*) defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." *Ibid.*

8. Pursuant to contracts with the Secretary of the Interior (Secretary) executed under federal reclamation law, the Project delivers stored water to two

irrigation districts—Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land (67,000 acres in Texas, and 88,000 acres in New Mexico). Those acreages, which are roughly equivalent to 43% for EPCWID and 57% for EBID, were confirmed in a contract between EPCWID and EBID that was signed on February 16, 1938, approximately one month before Colorado, New Mexico, and Texas signed the Compact.

9. The Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project.

10. Article II of the treaty provides that in cases of extraordinary drought, "the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States." 34 Stat. 2954.

11. The Project is designed to deliver more water than it releases from storage. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off the agricultural fields into drains to become "return flows." When those return flows get back to the river, they can be delivered to Project beneficiaries downstream. Return flows have histori-

cally comprised a significant part of the Project's deliveries.

12. Only persons having contracts with the Secretary may receive deliveries of water, including seepage and return flow, from a Reclamation project. See, *e.g.*, 43 U.S.C. 423d, 423e, 431, 439, 461. Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary.

13. New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts.

14. When water is extracted from the surface or the ground at places below Elephant Butte Reservoir, it affects surface water deliveries downstream. The Project may have to release additional water from storage to offset such extractions in order to maintain delivery of any given quantity of water to downstream users. Consequently, extraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.

15. Uncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where 43% of the available water could not be delivered to EPCWID, and 60,000 acre-feet per year could not be delivered to Mexico.

16. New Mexico has asserted that the United States is an indispensable party to this action.

WHEREFORE, the United States prays that the Court:

(a) declare that New Mexico, as a party to the Compact:

(i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico,

(ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and

(iii) must affirmatively act to prohibit or prevent such interception or interference;

(b) permanently enjoin and prohibit New Mexico from permitting such interception and interference;

(c) mandate that New Mexico affirmatively prevent such interception and interference; and

(d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2014

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES TO INTERVENE AS A PLAINTIFF

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES TO INTERVENE AS A PLAINTIFF

This action concerns the interpretation of the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Preamble, 53 Stat. 785. On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against New Mexico and Colorado and invited New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The United States respectfully moves for leave to intervene in this action as a plaintiff.

1. In 1905, Congress authorized construction of a Bureau of Reclamation (Reclamation) project known as the Rio Grande Project (Project) to provide a reliable irrigation system for southern New Mexico and western Texas. See Act of Feb. 25, 1905, ch. 798, 33

Stat. 814. Construction of the Project began in 1910, and Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73, 83 (1938) (*Joint Investigation*). Elephant Butte Reservoir is in New Mexico, approximately 105 miles north of the Texas border. It is a federally owned Reclamation facility.

In 1906, Reclamation entered into contracts with two irrigation districts: the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas. Those contracts provide for the irrigation of approximately 155,000 acres of land—67,000 acres in Texas, and 88,000 acres in New Mexico. *Joint Investigation* 73, 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. U.S. Amicus Br. App. 1a-4a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico.

The Project is designed to deliver more water than it releases from storage by relying on "return flows." Return flows consist of water from initial deliveries that seeps into the ground or flows off the agricultural fields and makes its way back into the river for delivery downstream. In calculating diversion allocations to Project beneficiaries, return flows have historically comprised a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irri-

gation development, the return water is an important consideration.").

In addition to water that the Project delivers to EBID and EPCWID pursuant to contracts with the Secretary of the Interior (Secretary), the Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. *Id.* arts. I & II, 34 Stat. 2953-2954.

On March 18, 1938, approximately one month after EPCWID and EBID entered into their contract confirming the acreage in each State that would receive Project water, the parties signed the Compact. Congress approved the Compact the following year. Act of May 31, 1939, ch. 155, 53 Stat. 785. The Compact was designed to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." Preamble, 53 Stat. 785.

Article IV of the Compact required New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission changed the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Compl. ¶ra. 13; N.M. Br. in Opp. 1 n.1. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "project storage" for purposes of the Compact, Art. I(k), 53 Stat. 786), it becomes "usable water" under the Compact, to be released by the

Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

2. In its complaint, Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground," downstream of Elephant Butte Reservoir in New Mexico. *Id.* para. 18. New Mexico contends that, because the Compact does not require New Mexico to deliver any amount of water to the Texas state line, the Complaint does not allege a violation of any express term of the Compact. N.M. Br. in Opp. 14-21.

3. The United States asks the Court for leave to intervene as a plaintiff in this action. Intervention of the United States is appropriate where "distinctively federal interests, best presented by the United States itself, are at stake." *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981); see *United States* v. *Louisiana*, 354 U.S. 515, 515-516 (1957) (per curiam) (intervention is warranted where "the issues in th[e] litigation are so related to the possible interests of [the party seeking to intervene] * * * in the subject matter of th[e] suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court"). This Court has previously granted the United States leave to intervene in original actions involving interstate water disputes in which the

United States demonstrated an important federal interest. See, *e.g.*, *Kansas* v. *Colorado*, 513 U.S. 803 (1994); *Arizona* v. *California*, 344 U.S. 919 (1953); *Nebraska* v. *Wyoming*, 304 U.S. 545 (1938); *Oklahoma* v. *Texas*, 253 U.S. 465 (1920). The United States has several distinct interests in this Compact dispute.

a. The parties' dispute concerns water released from a federal project that the Bureau of Reclamation in the Department of the Interior operates, including by setting the diversion allocations for Project water users downstream. The Court's interpretation of the parties' rights and obligations under the Compact will affect how Reclamation calculates those diversion allocations.

Pursuant to the 1938 contract between EPCWID and EBID, which was also signed by the Assistant Secretary of the Interior, see U.S. Amicus Br. App. 4a, Reclamation continues to calculate diversion allocations of Project water based on the split of 57% for EBID and 43% for EPCWID, which corresponds to the proportion of irrigable acreage in each district. See p. 2, *supra*. Reclamation now does so pursuant to a settlement agreement (the 2008 Operating Agreement) entered into by Reclamation, EBID, and EPCWID. Under that agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See U.S. Bureau of Reclamation, Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/

Final-SuppEA.pdf (*Supplemental Environmental Assessment*). After subtracting Mexico's share of the water, see p. 3, *supra*, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Supplemental Environmental Assessment* 13-14, 18. The effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico. *Id.* at 4.

If the Court were to determine in this action that New Mexico does not violate the Compact by allowing water users to extract water that is hydrologically connected to the Rio Grande from below Elephant Butte Reservoir—either without a contract with the Secretary or in excess of contractual amounts—that conclusion would undermine the assumptions underlying the United States' calculation of diversion allocations between EBID and EPCWID. The United States' interest in how the Project is operated is a distinctively federal interest that is best presented by the United States.

Furthermore, the 2008 Operating Agreement does not prohibit New Mexico from allowing or authorizing groundwater pumping. Accordingly, particularly under drought conditions, there would likely come a point at which uncapped groundwater pumping in New Mexico would reduce Project efficiency to an extent that 43% of the available water could not be delivered to Texas, even if EBID forwent *all* Project deliveries. The United States has an interest in ensuring that violations of the Compact by New Mexico do not prevent the United States from meeting its contractual obligations to Project beneficiaries.

b. The United States has a further interest in ensuring that New Mexico water users who do not have contracts with the Secretary for delivery of Project water, or who use Project water in excess of contractual amounts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries.

Since 1902, and consistently through subsequent amendments and supplements to Reclamation law, Congress has required a contract with the Secretary as a prerequisite for obtaining water from a Reclamation project. See, *e.g.*, Act of June 17, 1902 (Reclamation Act), ch. 1093, §§ 4-5, 32 Stat. 389 (43 U.S.C. 431, 439, 461); Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e);* see *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977) ("Project water * * * is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix."); *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (federal law requires federal consent to change the purpose of use for Reclamation project water); cf. *California* v. *United States*, 438 U.S. 645, 668 n.21 (1978) ("[S]tate water law does not control in the distribution

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* Under the 1902 Act, contracts with the Secretary were formed through petitions from individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

of reclamation water if inconsistent with other congressional directives to the Secretary.") (emphasis omitted). This statutory requirement has been in place and applicable to the Project since the Compact was signed in 1938, and it was specifically reaffirmed by Congress in the same year that it approved the Compact. See Reclamation Project Act of 1939, ch. 418, § 9(d), 53 Stat. 1195 (43 U.S.C. 485h(d)).

Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary. The United States has a distinctly federal interest in ensuring that this longstanding statutory requirement is not circumvented by New Mexico water users who intercept or interfere with the delivery of Project water either without a contract with the Secretary or in excess of contractual amounts.

c. The United States has a further interest in ensuring that New Mexico water users do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See p. 3, *supra*. Uncapped use of water below Elephant Butte Reservoir could reduce Project efficiency to a point where 60,000 acre-feet of water per year could not be delivered to Mexico.

Furthermore, under Article II of the treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See 34 Stat. 2954 (in the case of extraordinary drought, "the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States"). Where

surface water deliveries to irrigation districts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts, the United States must carefully consider whether Article II of the treaty would allow a proportional reduction of its delivery obligation to Mexico during an extraordinary drought. Ensuring that treaty obligations are satisfied is a distinctly federal interest that is best presented in this action by the United States.

4. The above interests of the United States are directly implicated in this dispute because the limitations on Project water use are incorporated into the Compact and made binding on New Mexico under the Compact. Once New Mexico complies with its obligation under Article IV of the Compact to deliver water to Elephant Butte Reservoir (*i.e.*, into "project storage," Art. I(k), 53 Stat. 786), the water becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. Reclamation controls the release for those uses described in Article I(*l*) of the Compact pursuant to federal contracts and a treaty that were already in place when the Compact was signed. See pp. 2-3, *supra*.

New Mexico's view that it may continue to allow depletions of Project water supply below Elephant Butte Reservoir is inconsistent with the requirement that New Mexico "deliver" a specific quantity of water into project storage. See Art. IV, 53 Stat. 788; see, *e.g.*, *Black's Law Dictionary* 494 (9th ed. 2009) (defining "delivery" as "[t]he formal act of transferring

something" or "the giving or yielding possession or control of something to another"). When New Mexico "delivers" water to Elephant Butte Reservoir under the Compact, it relinquishes control of the water to the Project. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the released water—and for "deliveries to Mexico." Art. I(*l*), 53 Stat. 786. New Mexico's view is also inconsistent with the Compact's basic purpose, which is to equitably apportion the water of the Rio Grande Basin—from its headwaters to Fort Quitman in Texas—among the three compacting States. See Preamble, 53 Stat. 785.

5. Finally, New Mexico has asserted that the United States is an indispensable party to this action. N.M. Br. in Opp. 31-34. Granting the United States' motion for leave to intervene will eliminate that question and permit a judicial resolution of the parties' dispute over the interpretation of the Compact.

CONCLUSION

The motion for leave to intervene as a plaintiff should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2014

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AND
BRIEFS

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In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to Intervene

TEXAS' RESPONSE IN SUPPORT OF MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

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The State of Texas does not oppose, and in fact supports, the Motion of the United States for Leave to Intervene as a Plaintiff.

Respectfully submitted,

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RECORD AND BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

On Motion For Leave To Intervene

NEW MEXICO'S RESPONSE TO THE MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

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On February 27, 2014, the United States filed its Motion of the United States for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as a Plaintiff. New Mexico does not oppose the Motion of the United States for Leave to Intervene insofar as the United States seeks leave to become a party to this proceeding on the existing pleadings. New Mexico objects, however, to the United States' proposed Complaint in Intervention as follows.

First, to the extent that the United States is attempting to inject a new issue of whether the sources of water for its water right in the Rio Grande Project include groundwater, *see* Complaint in Intervention ¶ 13, federal law mandates that the United States comply with state law in appropriating water rights and distributing water in the Project, 43 U.S.C. § 383. Federal law waives the United States sovereign immunity in state court for adequate state adjudications to determine the elements of the water rights for Reclamation projects. 43 U.S.C. § 666. The United States is required to adjudicate its water right in the Rio Grande Project in the current state adjudication court. *United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002) (affirming that the United States must adjudicate the Rio Grande Project water right in New Mexico state court). The adjudication court has already determined that the United States did not appropriate groundwater for the Project and that therefore groundwater is not a source of water for the Project. Order Granting the State's Motion to

Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 2-4, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. CV-96-888 (3rd Jud. Dist. Ct. Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/overview/cat_view/18-stream-system-issues/17-ss-97-104.html.

Second, jurisdiction in this Court is dependent on the Texas Bill of Complaint, and the Court has allowed New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. If the Court grants New Mexico's motion and dismisses Texas' Complaint, the United States Complaint in Intervention should also be dismissed. An adequate alternative forum – the United States federal district court – exists to resolve the claims related to the Rio Grande Project that the United States elects independently to pursue. *See South Carolina v. Regan*, 465 U.S. 367, 402 n.18 (1984) (O'Connor, J., concurring) ("where Congress expressly leaves open an alternative forum in which an original plaintiff can raise its claims, this Court will ordinarily presume that original jurisdiction is inappropriate"); *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Third, the Complaint in Intervention fails to state a claim because it misconstrues the respective rights and obligations of the Bureau of Reclamation

and the states under the Reclamation Act. 43 U.S.C. §§ 371 et seq.

To address these, and other potential issues, New Mexico requests leave to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to challenge the claims raised by the United States in its Complaint in Intervention. The existing deadline for New Mexico to file its Motion to Dismiss the Texas Complaint is March 28, 2014. If the Court is inclined to grant New Mexico's request for leave to file a similar motion to dismiss the United States' Complaint in Intervention, New Mexico suggests that the matters be briefed and considered together, and that a deadline to move to dismiss both Complaints be set at thirty days from the date on which the Court issues its order on the United States Motion to Intervene. Such an extension would allow New Mexico to incorporate its argument to dismiss the Texas Complaint and the Complaint in Intervention in a single memorandum.

CONCLUSION

The United States' motion for leave to intervene as a plaintiff should be granted subject to the foregoing objections. New Mexico should be given leave to file a motion in the nature of a motion to dismiss the Complaint in Intervention. New Mexico suggests that judicial efficiency is served if New Mexico is given a thirty-day extension from the date the Court issues

its order on the Motion to Intervene to file a motion to dismiss the Texas Complaint together with its Motion to dismiss the United States' Complaint in Intervention so that the issues can be submitted and considered together. A letter requesting such an extension has been submitted to the Clerk of the Court.

Respectfully submitted,

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STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

REPLY MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

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ON BILL OF COMPLAINT

REPLY MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

On February 27, 2014, the United States filed a motion for leave to intervene in this original action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States describes several distinct federal interests that are at stake in this dispute over the interpretation of the Rio Grande Compact (Compact): (1) the operation of the Rio Grande Project (Project) by the Bureau of Reclamation, including how diversion allocations for Project users are calculated; (2) the delivery of water to Project beneficiaries without interception or interference by New Mexico water users who do not have contracts with the Secretary of the Interior for delivery of Project water, or who use Project water in excess of contractual amounts; and

(3) the delivery of water to Mexico without such interception or interference by New Mexico water users pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. See U.S. Mem. in Support 4-10. The United States explains in its memorandum in support of its motion for leave to intervene that the Compact incorporates provisions governing the Project and deliveries to Mexico, and the interests of the United States therefore are directly involved in the questions of Compact interpretation in this case. *Id.* at 9-10.

The United States further explains in its memorandum that New Mexico has asserted that the United States is an indispensable party to this action. Granting the United States' motion for leave to intervene will eliminate that question and permit a judicial resolution of the parties' dispute over the interpretation of the Compact. See U.S. Compl. para 16; U.S. Mem. in Support 10.

In response to the United States' motion for leave to intervene, New Mexico states that it does not oppose the motion "insofar as the United States seeks leave to become a party to this proceeding on the existing pleadings," but New Mexico makes three "object[ions]" to the United States' proposed complaint in intervention.* New Mexico contends: (1) that

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* Although the Federal Rules of Civil Procedure are not strictly applicable in original cases, they provide a guide to the Court's proceedings. See Sup. Ct. R. 17.2. Under Federal Rule of Civil Procedure 24(c), a motion to intervene "must * * * be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). It has thus been the

the United States' interpretation of federal reclamation law is incorrect; (2) that the complaint in intervention should be dismissed if the complaint filed by Texas is dismissed; and (3) that the complaint in intervention fails to state a claim "because it misconstrues the respective rights and obligations of the Bureau of Reclamation and the states under the Reclamation Act." N.M. Resp. 1-3.

Those objections are not appropriately resolved in connection with the United States' motion for leave to intervene. New Mexico does not contest that "distinctively federal interests, best presented by the United States itself, are at stake" in this Compact dispute. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). Intervention is thus warranted based on the uncontested federal interests outlined in the United States' memorandum. As New Mexico appears to acknowledge by seeking leave to file a motion to dismiss the United States' complaint in intervention as well as Texas's complaint (see N.M. Resp. 3), the issues that New Mexico raises in its response should be raised in a motion to dismiss the United States' complaint in intervention, or later in these proceedings, if the United States is permitted to intervene.

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practice of the United States, when seeking leave to intervene as a plaintiff in an original action, to include a proposed complaint in intervention with its motion.

CONCLUSION

The motion of the United States for leave to intervene as a plaintiff should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2014

RECORD AND BRIEFS

No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Motion To Dismiss

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION[1]

When the Court granted Texas' Motion for Leave to File Complaint in *Texas v. New Mexico and Colorado*, Original, No. 141, it stated that New Mexico could file a motion to dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." *See* Court's Order dated January 27, 2014. On April 30, 2014, New Mexico filed a Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention in the original action.

[1] All parties received timely notice of the City's intent to file an *amicus curiae* brief.

The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in support of New Mexico's Motion to Dismiss pursuant to Sup. Ct. R. 37.4, to bring to the Court's attention related municipal water supply issues unique to the City.

INTEREST OF *AMICUS CURIAE*

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s and received its first municipal water supply from the Acequia Madre around 1846. Because of the unreliability of the surface water, Las Cruces transitioned to wells in 1905, thereby initiating its municipal groundwater rights. Today the City is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the United States and its population is expected to exceed 150,000 by 2050. The City's water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin.

Las Cruces is a party to a general stream system adjudication of all interrelated surface water and groundwater rights in the Lower Rio Grande.[2] *See State of New Mexico ex rel. State Engineer v. Elephant*

[2] "Lower Rio Grande" as used in this brief refers to the Rio Grande Basin in New Mexico between Elephant Butte Reservoir and the New Mexico-Texas state line.

Butte Irrigation Dist., et al., No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996) ("LRG Adjudication"). The LRG Adjudication is defining, quantifying, and prioritizing all water rights in the Lower Rio Grande, including that of the Rio Grande Project. The United States' Rio Grande Project water right has largely been determined in the LRG Adjudication. Las Cruces is a party to the LRG Adjudication for a determination of its water rights and for potential *inter se* challenges against other water right claimants. *See infra* at 6-9.

Texas' Complaint and the United States' Complaint in Intervention place into issue the nature of the Rio Grande Project water right and the proper forum for the determination of that right. This has major repercussions for the City's municipal water supply. If New Mexico's Motion to Dismiss is granted, the LRG Adjudication Court will complete a judicial determination of the Rio Grande Project water right in the near future.[3] The Rio Grande Project water right below Elephant Butte Reservoir will be administered in priority along with all other state-based water rights. The only way there will be a unified administrable decree, however, is if all interrelated water rights are adjudicated, including the Rio Grande Project water right. State administration, if done properly, will protect all water rights in the

[3] The New Mexico Supreme Court appointed a Water Judge to preside over the LRG Adjudication ("LRG Adjudication Court").

Lower Rio Grande, including those of the Rio Grande Project and Las Cruces.

If New Mexico's Motion to Dismiss is not granted, Las Cruces' municipal groundwater rights are directly threatened in Texas' Complaint and the United States' Complaint in Intervention. This results from Texas' and the United States' interpretation that the Rio Grande Compact: 1) requires specific state line deliveries, although contrary to the express language of the Compact; 2) results in a *de facto* apportionment of the Lower Rio Grande that ignores Las Cruces' water use and locks Las Cruces and New Mexico, but not Texas, into 1938 water use conditions; 3) divests New Mexico of jurisdiction over all surface water and groundwater in the Lower Rio Grande, assuming all groundwater is hydrologically connected to the surface water; and 4) places Las Cruces' state-based groundwater rights in jeopardy and requires the City to obtain a water supply contract from the United States to divert groundwater used for municipal purposes, despite Las Cruces' senior priority to the Rio Grande Project.

BACKGROUND

1. Rio Grande.

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact,

Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). Through an inflow/outflow formula, the Rio Grande Compact limits stream depletions upstream of Elephant Butte Reservoir.

Colorado is obligated to deliver a percentage of the gauged inflow at the New Mexico-Colorado state line under Article III of the Rio Grande Compact. This delivery obligation is measured by a gauging station at Lobatos, Colorado.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gauging station at Otowi, New Mexico. A resolution of the Rio Grande Compact Commission in 1948 changed New Mexico's delivery obligation from San Marcial into Elephant Butte Reservoir.

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande runs from the New Mexico-Colorado state line to Otowi Gauge. The Middle Rio Grande is situated between the Otowi Gauge and Elephant Butte Reservoir, and the Lower Rio Grande stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line.

Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply for a growing city.

2. Rio Grande Project.

Pursuant to the Reclamation Act, the United States initiated the acquisition of a surface water right for the Rio Grande Project by filing Notices of Intent to Appropriate with the New Mexico Territorial Engineer in 1906 and 1908. *See* Reclamation Act of 1902, §§ 2 and 8, 32 Stat. 388; *see also* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. The Notices of Intent sought to reserve then-unappropriated surface water upstream of Elephant Butte Reservoir for storage in the reservoir for use in the Rio Grande Project.

Once released from Elephant Butte Reservoir, Rio Grande Project surface water is allocated between Elephant Butte Irrigation District ("EBID"), located in New Mexico, and El Paso County Water Improvement District No. 1 ("EP No. 1"), located in Texas. Administration of Rio Grande Project water released from Elephant Butte Reservoir was not addressed in the Rio Grande Compact, and therefore is governed by a combination of contracts and state and federal law.

3. Lower Rio Grande Adjudication.

A general stream system adjudication is a special statutory proceeding set forth in N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012).

An adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The LRG Adjudication was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico.

Las Cruces has a two-fold interest in the LRG Adjudication. First, the City seeks judicial recognition of its water rights to supply the municipal needs of up to 150,000 people in the near future. Second, Las Cruces must be prepared to challenge *inter se* other defendants' water right claims. The City's right to due process is only protected if all water rights claimants (indispensable parties) are present and joined to a decree for post-adjudication administration.

Despite its opposition, the United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its Rio Grande Project water right. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University,* 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993). A judicial determination of the United States' Rio Grande Project water right is

nearly complete. The LRG Adjudication Court has held that groundwater is not part of the Rio Grande Project water right.[4] It has also quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.[5] The only issue still pending is a determination of the Rio Grande Project priority date which is scheduled for trial.

The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus*

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[4] The LRG Adjudication Court held that "New Mexico law . . . controls the determination of the source or sources of water for the Project." *See* Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Aug. 16, 2012) at 4. It found that the "points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to *surface water* under New Mexico law. . . ." *Id.* at 6 (emphasis added).

[5] *See* Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Feb. 17, 2014).

curiae, filing briefs and presenting oral arguments in that case.[6]

While a final adjudication decree will ultimately be utilized for administration of all interrelated surface water and groundwater rights in the Lower Rio Grande, the New Mexico Supreme Court has upheld the statutory authority of the State Engineer to administer water rights without a final adjudication decree pursuant to Active Water Resource Management Regulations. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 239 P.3d 1232, 2012-NMSC-039; N.M. Stat. § 72-2-9.1 (2003).

SUMMARY OF ARGUMENT

Texas and the United States argue that it was "understood" that the Rio Grande Compact requires the delivery of a specific amount of water at the New Mexico-Texas state line, despite contrary language in the Compact. They argue that the Rio Grande Compact resulted in a tacit apportionment of the waters of the Lower Rio Grande, resulting in New Mexico being locked into 1938 conditions without any consideration of Las Cruces' existing and future municipal water use. Texas and the United States then posit that all surface water and hydrologically connected groundwater below Elephant Butte Reservoir in New

[6] El Paso supported by EP No. 1 recently moved to stay proceedings in the LRG Adjudication on issues related to the United States' Rio Grande Project water right.

Mexico are Rio Grande Project water, which the United States contends cannot be diverted without obtaining a water supply contract from it. *See* United States' Complaint in Intervention at 4, ¶¶ 12 and 13. This position results in New Mexico being divested of state jurisdiction over all surface water and groundwater in the Lower Rio Grande, assuming that all groundwater is hydrologically connected, thereby threatening the viability of Las Cruces' water supply.

Texas and the United States are wrong for two reasons. First, New Mexico's delivery obligation under the Rio Grande Compact is at Elephant Butte Reservoir, not the New Mexico-Texas state line. *See* Rio Grande Compact at Art. IV, as amended. New Mexico cannot violate a compact provision that does not exist. The relief Texas and the United States seek, *viz.*, state line deliveries, would result in modification, not enforcement, of the Rio Grande Compact to the exclusion of Las Cruces' interests which were not included in the Compact.

Moreover, the United States contends that all surface water and hydrologically connected groundwater in the Lower Rio Grande is Rio Grande Project water. Assuming all groundwater is hydrologically connected to surface water, the United States' attempt to "enforce" the Rio Grande Compact results in a federalization of the Lower Rio Grande, with all surface water and groundwater users in New Mexico being regulated by the United States, not

New Mexico. This is contrary to *California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978) which confirm that states have plenary control over the waters within their borders. The United States' argument places Las Cruces' adjudicated groundwater rights obtained under state law at risk. It would require the City to enter into a water supply contract with the United States to divert groundwater in the Lower Rio Grande for municipal use, despite that the City's groundwater use was initiated more than 100 years ago, prior to the Rio Grande Project. Texas' and the United States' allegations in this regard do not "plausibly give rise to an entitlement to relief." *See infra* Point I.

Second, Texas and the United States would have the Court wade into a determination of the Rio Grande Project water right, something that has already been largely accomplished in the LRG Adjudication. By effectively removing the United States' interests, the LRG Adjudication Court could not fashion a unified decree for administration of the interrelated water rights in the Lower Rio Grande. *See infra* Point II.

ARGUMENT

POINT I

TEXAS AND THE UNITED STATES HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The standard for granting a motion for leave to file a complaint in an original action is different from that required to sustain an action against a motion to dismiss. When evaluating a motion for leave to file a complaint in an original action, the Court emphasizes two factors – "the nature of the interest of the complaining state" with a focus on the "seriousness and dignity of the claim" and "the availability of an alternative forum in which the issues tendered can be resolved." *See Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992).

Under Fed. R. Civ. P. 12(b)(6), however, a party may seek to dismiss a complaint by asserting the "failure to state a claim upon which relief can be granted."[7] The purpose of such a motion is to test the legal sufficiency of the pleader's claims for relief, assuming that non-conclusory, well-pleaded factual allegations are true, and determining whether those factual allegations can support a claim for relief.

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[7] Pursuant to Sup. Ct. R. 17(2) "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides."

In deciding a motion to dismiss, a court evaluates a complaint's legal sufficiency under a two-pronged analysis – first segregating conclusory allegations from those that constitute "well-pleaded" allegations, and then determining whether the latter only, accepted as true, "plausibly give rise to an entitlement to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

Here, Texas and the United States allege that New Mexico has violated provisions of the Rio Grande Compact. A review of the Compact, however, demonstrates that even if accepted as true, the allegations do not give rise to Compact violations.[8] Texas and the United States fail to plead allegations that even if accepted as true, "plausibly give rise to an entitlement to relief" and New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

A. Texas and the United States have not pled a violation of the Rio Grande Compact.

Despite contrary language, Texas and the United States allege that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface

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[8] In applying the two-prong test, Las Cruces has not segregated "conclusory allegations" from "well-pleaded" allegations in Texas' Complaint and the United States' Complaint in Intervention. Instead, it has focused on the second prong because the allegations, whether conclusory or well-pleaded, do not "plausibly give rise to an entitlement to relief."

water and groundwater between Elephant Butte Reservoir and the New Mexico-Texas state line beyond 1938 conditions. *See* Texas' Complaint at ¶¶ 4, 10, 11, 18, and 19. Texas and the United States improperly transform Rio Grande Project water supply allocations below Elephant Butte Reservoir into state line Compact delivery obligations.

New Mexico's delivery obligation into Elephant Butte Reservoir under Article IV of the Rio Grande Compact and the absence of a state line delivery obligation have previously been addressed. In *City of El Paso v. Reynolds*, a federal district court held that "New Mexico is obligated to make delivery not at the New Mexico-Texas state line but 'into Elephant Butte Reservoir.'" *See City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M.1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M.1984). The Court further observed that neither the history of the Compact negotiations nor the ultimate terms of the Compact "support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and Texas." *Id.* The district court stated the Compact "did not apportion any specified amount of water to Texas below Elephant Butte." *Id.* at 385.

An identical conclusion was reached by the New Mexico Court of Appeals when it held that the "Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line." *See Elephant Butte Irrigation*

Dist. v. Regents of New Mexico State University, 849 P.2d at 378. A federal district court in Texas agreed, stating that the Rio Grande Compact:

> has a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam . . . .

See El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907 (W.D.Tex.1955), *aff'd,* 243 F.2d 927 (5th Cir. 1957); *see also Rio Grande Silvery Minnow v. Keys,* 469 F. Supp. 2d 973, 996 (10th Cir. 2002); H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications*, at 272-91 (1968); Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2); and S.E. Reynolds, and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 Nat. Resources J. 201 (1974 No. 2).

There is no state line delivery obligation for New Mexico in the Rio Grande Compact. Once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *see generally Arizona v. California*, 373 U.S. 546, 565-66 (1963); *New Jersey v. New York*, 523 U.S. 767, 811 (1998). In this

case, Texas and the United States are seeking relief inconsistent with the express terms of the Rio Grande Compact. New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

B. Texas and the United States seek to modify, not enforce, the Rio Grande Compact.

Because the Rio Grande Compact states nothing about a delivery obligation at the New Mexico-Texas state line, the relief that Texas and the United States seek would result in modification, not enforcement, of the Compact to the detriment of Las Cruces.

As stated by the Commissioner negotiating the Rio Grande Compact for New Mexico, "for the purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." *See* Hill, *supra,* at 172. This is crucial to Las Cruces because only equities above Elephant Butte Reservoir were considered and evaluated in determining New Mexico's allocation of water under the Rio Grande Compact. New Mexico's equities below Elephant Butte Reservoir were not considered.

Had New Mexico's delivery point under the Rio Grande Compact been at the state line instead of into Elephant Butte Reservoir, equities south of Elephant Butte Reservoir, principally Las Cruces' interests, as the state's second largest city, would had to have been included in determining New Mexico's allocation

of Lower Rio Grande water. The fictional compact which Texas and the United States seek to enforce makes the absurd assumption that New Mexico approved a compact which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project with the full understanding that there could be no groundwater diversions by Las Cruces. New Mexico never would have ratified such a compact intentionally excluding the City's interests.

Texas' and the United States' allegations in this regard, even if assumed to be true, should be dismissed under Fed. R. Civ. P. 12(b)(6).

C. The United States seeks to federalize the Lower Rio Grande in New Mexico.

In its Complaint in Intervention, the United States discloses the drastic remedy that it seeks. The United States alleges that New Mexico has "allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts." *See* United States' Complaint in Intervention at 4, ¶ 13. It contends that only persons having contracts with the Secretary are entitled to Rio Grande Project water and the only

entity in New Mexico with a water supply contract with the United States is EBID. *Id.* at ¶ 12.

The United States is claiming ownership of all surface water and groundwater rights in the Lower Rio Grande in New Mexico, assuming all groundwater is hydrologically connected to the surface water. The effect of the United States' argument is to divest New Mexico of its plenary control and administration over the water resources within its borders and to federalize this section of the Rio Grande, placing Las Cruces' water rights in jeopardy.

As a result of the Public Land Acts of 1866, 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S. Ct. 655, 666,

> 51 L.Ed. 956, the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935) (emphasis added). *See also California v. United States*, 438 U.S. at 645 and *United States v. New Mexico*, 438 U.S. at 696. Accordingly, New Mexico, not the United States, has the ability to regulate and administer surface water and groundwater rights in the Lower Rio Grande. Las Cruces' water rights are based on that principle of law.

In granting the United States' request for a surface water right upstream of Elephant Butte Reservoir to store in the reservoir for the benefit of the Rio Grande Project, New Mexico did not implicitly give the Lower Rio Grande to the United States to the exclusion of all other surface water and groundwater users in the State.

The United States' contention that it owns all surface water and hydrologically connected groundwater in the Lower Rio Grande could have significant adverse consequences for Las Cruces. Assuming all groundwater is hydrologically connected to the surface water, the City would be forced to enter into water supply contracts with the United States, presumably abandoning its state-based groundwater rights. After more than 100 years of obtaining its municipal water supply from state-based groundwater rights without objection from the United States, water rights that pre-date the Rio Grande

Project, the United States should be estopped from claiming that it, not New Mexico, should be the regulator of groundwater in the Lower Rio Grande. As the Court confirmed in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), long-standing acquiescence in an administrative practice can foreclose later arguments to the contrary. *Ibid.* at 595 ("And even if the issue was not previously determined [in prior litigation], we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence.").

The United States' Complaint in Intervention is legally insufficient to survive a motion to dismiss with respect to its allegations of ownership of all surface water and groundwater in the Lower Rio Grande.

POINT II

THE LOWER RIO GRANDE ADJUDICATION IS THE ONLY FORUM TO DETERMINE ADMINISTRABLE WATER RIGHTS IN THE LOWER RIO GRANDE

Texas and the United States seek to remove issues related to the United States' Rio Grande Project water right in New Mexico that have been and are being determined as a matter of state law in the LRG Adjudication and have them litigated as Rio Grande Compact issues in the Court's original jurisdiction.

Texas and the United States have failed to plead allegations that even if assumed to be true, "plausibly give rise to an entitlement to relief." *See Ashcroft v. Iqbal*, 556 U.S. at 679. Their complaints lack legal sufficiency because the Rio Grande Compact cannot be "enforced" by removing an indispensable claimant from the LRG Adjudication to declare a putative Compact right that can avoid state priority administration. New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

A. Water rights derived under New Mexico law must be adjudicated under New Mexico law.

The Rio Grande Project water right is a state-based water right, not a right derived from the Rio Grande Compact. In 1902, the Reclamation Act was passed by Congress and requires the United States to acquire its water rights pursuant to state law. Specifically, Section 8 of the Reclamation Act states:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator,

> or user of water in, to, or from any interstate stream or the waters thereof:

See Reclamation Act of 1902, § 8, 32 Stat. 388.

Pursuant to the Reclamation Act of 1902, the United States' Rio Grande Project water right was initiated and acquired pursuant to state law through Notices of Intent to Appropriate filed with the New Mexico Territorial Engineer in 1906 and 1908. *See* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40; N.M. Stat. § 72-5-33 (1995). The United States is a water user, not a water rights regulator with the authority to give contracts to other water users.

Many cases confirm the states' plenary control over their water resources. In *California v. United States, supra,* the Court found that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *See California v. United States*, 438 U.S. at 653. In *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981), the Tenth Circuit held: "[i]t generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach." Similarly, in *United States v. New Mexico*, 438 U.S. at 702, the Court held: "Where Congress has expressly addressed the question of whether federal entities must abide by

state water law, it has almost invariably deferred to the state law."

Because the Rio Grande Project water right derives from New Mexico law, it must be adjudicated under New Mexico law and placed in a decree for unified administration.

B. An administrable decree must include all water rights in the Lower Rio Grande, including the United States' Rio Grande Project water right.

For there to be an administrable decree in the Lower Rio Grande, the LRG Adjudication must include all interrelated surface water and groundwater rights in the basin, including the United States' Rio Grande Project water right.

There are approximately 18,000 defendants in the LRG Adjudication claiming rights to surface water and groundwater, with 14,000 active subfiles, and more than 5,000 subfile orders which have been entered. Removing the United States' Rio Grande Project water right from the LRG Adjudication will prevent there from being a unified, administrable decree.

An adjudication is an inherently *inter se* proceeding. The rights adjudicated to one party affect those adjudicated to another. The adjudication is not final until a process has been completed in which all individual claimants are entitled to contest the rights adjudicated to other defendants. *See State ex rel. Reynolds v. Sharp,* 344 P.2d 943, 66 N.M. 192 (1959);

State ex rel. Reynolds v. Allman, 427 P.2d 886, 78 N.M. 1 (1967). Some courts in New Mexico employ a two-phase process and others have combined the first phase and the *inter se* phase of an adjudication in an effort to promote judicial efficiency. This latter process was done in the LRG Adjudication in which "stream system issues" have been litigated in one proceeding where all defendants in the adjudication are joined for the determination of that right. The key issue is providing due process to appear and be heard in making an *inter se* challenge.

Texas and the United States view the Rio Grande Project water right as being a "Compact right" superior to other state-based water rights. The implication is that the LRG Adjudication should be completed for all water rights, except that of the Rio Grande Project which in their view is not subject to adjudication or priority administration.[9] They rely on a misreading of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) for this theory. A review of that case, and placing the Rio Grande Project water right in proper context, demonstrates that *Hinderlider* is indeed applicable, but only if the LRG Adjudication includes the Rio Grande Project water right.

Hinderlider concerned the La Plata River & Cherry Creek Ditch Co. whose water rights had been

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[9] *See* Brief for the United States as *Amicus Curiae* at 20 ("Texas's Compact apportionment must be respected by New Mexico regardless of the claims of its water users to Rio Grande water under New Mexico law.").

adjudicated in state proceedings in 1898. *See Hinderlider*, 304 U.S. at 98. The La Plata River Compact subsequently apportioned the river through equitable principles between New Mexico and Colorado in 1925. Under the Court's decision in *Hinderlider*, the Ditch Company's water rights could not be exercised under certain flow conditions until New Mexico's compact obligations were met.

In this case, the United States' Rio Grande Project water right must be incorporated into and become an integral part of a final LRG Adjudication decree – not apart from it. If the United States and Texas force the removal of the United States' Rio Grande Project water right and prevent it from being adjudicated, they will deny Las Cruces and all other LRG Adjudication defendants due process to challenge the United States' Rio Grande Project water right obtained under state law and destroy the possibility of a unified, adjudication decree that would allow administration under *Hinderlider*.

C. The United States' Rio Grande Project water right is nearly resolved in the LRG Adjudication.

The adjudication of the United States' Rio Grande Project water right is nearly complete in the LRG Adjudication. *See supra* at 6-9. All issues have been resolved except the Rio Grande Project priority date.

Despite the resolution of these issues, Texas and the United States, seemingly unsatisfied with the

outcome of the LRG Adjudication, are attempting to relitigate these issues as "Compact issues" in the original jurisdiction of the Court.[10] Removing a determination of the Rio Grande Project water right now cannot be done without denying Las Cruces due process of law and impairing the ability of the City to protect its interests.

D. State administration is required for the adjudication decree.

The purpose of an adjudication is to provide a decree containing a full description of the water rights adjudged to each party. Following the entry of an adjudication decree, administration is then undertaken by the State Engineer. The Court has declined to undertake decree administration of the kind that Texas and the United States seek. As the Court stated in *Texas v. New Mexico*:

> We have expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the States involved. *E.g., Vermont v. New York*, 417 U.S. 270 (1974); *Wisconsin v. Illinois*, 289 U.S. 710, 711 (1933) (citation omitted). Continuing supervision by this Court of water decrees would test the limits

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[10] The United States has the right to appeal the LRG Adjudication Court's determination of its Rio Grande Project water right.

> of proper judicial functions, and we have thought it wise not to undertake such a project. *Vermont v. New York, supra*, 417 U.S., at 277 (citation omitted).

See Texas v. New Mexico, 462 U.S. at 566. A final adjudication decree in the Lower Rio Grande should be administered by New Mexico, not the Court.

CONCLUSION

For the foregoing reasons, Texas' Complaint and the United States' Complaint in Intervention fail to state a claim upon which relief can be granted and should be dismissed under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF STATE OF TEXAS AND UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF STATE OF TEXAS AND UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas and United States in opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention and its Brief in Support ("Motion to Dismiss" and "N.M. Brief") pursuant to Supreme Court Rule 37.

INTRODUCTION

In this Original Action, the State of Texas seeks to enforce against the State of New Mexico the terms of the Rio Grande Compact ("Compact"), signed by the States of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress in the Act of May 31, 1939, ch. 155, 53 Stat. 785. Subsequent to Texas' filing of its Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint on January 8, 2013, the United States moved to intervene and filed a Complaint in Intervention. The Complaint in Intervention also seeks to require New Mexico to comply with its

obligations under the Compact as it relates to the Rio Grande Reclamation Project ("Rio Grande Project" or "Project"), a federal interstate reclamation project operated by the United States Bureau of Reclamation ("Bureau of Reclamation"). On January 27, 2014, the Court granted Texas leave to file its Complaint ("Texas Complaint"), with the right of New Mexico to file a motion to dismiss, and for Texas to respond to any such motion. On March 31, 2014, the Court granted the United States' Motion to Intervene and allowed the filing of the United States Complaint in Intervention ("U.S. Complaint"). New Mexico filed its Motion to Dismiss on April 30, 2014, which was supported by the City of Las Cruces' *Amicus Curiae* Brief in Support of State of New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention ("City of Las Cruces Brief").

The Motion to Dismiss should be denied. Both the Texas Complaint and the U.S. Complaint sufficiently allege a claim for interpretation and enforcement of the Rio Grande Compact. Only this Court can interpret and enforce the Compact.[1]

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[1] The background of both the Rio Grande Compact and the Rio Grande Project are set forth in the Texas Complaint, ¶¶ 2-16; Texas' Brief in Support of Motion for Leave to File Bill of Complaint, at 5-18; and the U.S. Complaint, ¶¶ 3-12.

INTEREST OF THE *AMICUS CURIAE*

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. Art. XVI, § 59(b); *see El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (stating EPCWID is a political subdivision of the State of Texas, and EPCWID "is not only an arm of the State, but is fashioned to perform public service and duties of high importance to the welfare of the people of Texas"). EPCWID provides water for irrigation and municipal uses (pursuant to contracts entered into, with the approval of the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID which are classified as irrigable. EPCWID provides, on average, over fifty percent of the annual water supply of the City of El Paso from EPCWID's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Compact, and allocated to EPCWID through the Project, for irrigation, crop production, and municipal uses. EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. EPCWID is one of the two Project beneficiaries in the United States below

Elephant Butte Dam and above Fort Quitman, Texas; the other is Elephant Butte Irrigation District ("EBID"), serving southern New Mexico Project water users.

The Rio Grande Project was authorized in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas, and, pursuant to international treaty, to Mexico. *See* Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act") (extending the Reclamation Act of 1902, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906). The Rio Grande Compact was designed to ensure that the Project remained viable by requiring New Mexico's Rio Grande Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become Project water to be allocated and delivered by the Bureau of Reclamation to the Project beneficiaries.

EPCWID provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. *See* Tex. Water Code § 55.185 (authorizing EPCWID to enter into contracts with the Bureau of Reclamation). These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project.

EPCWID has a contract with EBID, approved by the United States, dated February 16, 1938, which provides, in part, that 67/155th of the Rio Grande Project water is to be distributed to EPCWID, and 88/155th to EBID.[2] In 2007, EPCWID filed a lawsuit in the Western District of Texas against EBID and the Bureau of Reclamation, seeking to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested that the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement that included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method for the Bureau of Reclamation to allocate among EBID, EPCWID, and Mexico and deliver Project water released from Elephant Butte Dam. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and New Mexico's interference with the operation of the Project by the United States has, and will continue to have,

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[2] A copy of this contract is contained in the Appendix to the United States' Brief *Amicus Curiae*. App. 1a.

detrimental effects on the continued viability of the Rio Grande Project and the 2008 Operating Agreement.

ARGUMENT

The fundamental question properly brought by both Texas and the United States to this Court concerns the relationship of the Rio Grande Compact, and the rights and the obligations of Texas and New Mexico thereunder, to the Rio Grande Project. This relationship – the Project's existence, ability to function, and the benefits it was designed to provide at the time of the Compact – is the very basis for the Compact rights of Texas. New Mexico's Compact delivery into the Project has always served, and been intended to serve, as Texas' Compact apportionment. Now, Texas and the United States have asked the Court to resolve the dispute with New Mexico as to the rights of Texas and the nature of Texas' apportionment. Texas appropriately argues that once New Mexico makes its Compact delivery, it cannot take back, through downstream depletions, the very same waters claimed by New Mexico to have satisfied its Compact delivery obligation. Tex. Compl. ¶ 18. New Mexico rejects this view, arguing instead that it can deliver to Project storage as required by the Compact, and because there is no state-line delivery requirement and the Project operates in part within New Mexico's borders, it can then take back the water it

delivers and use that water for its own purposes. N.M. Brief at 59.

New Mexico's Motion to Dismiss does not demonstrate that the Complaints of Texas and the United States fail to state a claim under which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). For purposes of resolving the Motion to Dismiss, the Court accepts as true the factual allegations contained in the Texas Complaint and U.S. Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). New Mexico, however, attempts to avoid this standard by arguing the case on the merits, relying on selective extrinsic evidence and erroneous Compact interpretation. In so doing, New Mexico misrepresents the Complaints of Texas and the United States by stating they seek a state-line Compact delivery, N.M. Brief at 20, 28-29; misconstrues the importance of the Project vis-à-vis definition and establishment of Compact rights and obligations, N.M. Brief at 48-52, 59-64; attempts to transmute the Texas and United States Complaints into a reclamation contract dispute, *id.*; and continues to argue that the issues raised in the Complaints can be resolved through application of New Mexico state law and allowing New Mexico state adjudication and administration of the Project water supply, including the Compact rights of Texas, N.M. Brief at 63-64. New Mexico's Motion to Dismiss is a bald

attempt to avoid adjudication on the merits of the significant Compact dispute raised by the Complaints by ignoring the importance of the Project to Compact rights and obligations. Contrary to New Mexico's protestations, and as pled in the Complaints, this case presents a fundamental interstate Compact dispute, which this Court and only this Court can, and should resolve.

I. New Mexico Is Violating its Compact Obligations by Facilitating Depletions Below Elephant Butte Dam and Depriving Texas of its Compact Apportionment.

New Mexico's primary argument in its Motion to Dismiss is based on a fallacy: that the Texas Complaint should be dismissed because it requests establishment or enforcement of a state-line delivery which does not exist under the Compact. *See* N.M. Brief at 20, 28-29; *see also* City of Las Cruces Brief at 14-15. In fact, the Texas Complaint does not request enforcement or establishment of a state-line delivery. To the contrary, the Complaint clearly acknowledges that there is no Compact state-line delivery. Tex. Compl. ¶ 10. Rather, Texas and the United States allege New Mexico has violated the Rio Grande Compact by unlawfully allowing depletions of the Compact deliveries it makes to the Rio Grande Project. *Id.* ¶¶ 10-11, 13, 18-19; U.S. Compl. ¶¶ 13-14. New Mexico has violated and continues to violate its Compact delivery obligation by delivering water into Elephant Butte Reservoir, but subsequently allowing users within the

geographic territory of New Mexico to divert and intercept surface water and pump water hydrologically connected to the Rio Grande when deliveries are released from Project storage. Tex. Compl. ¶¶ 18-21; U.S. Compl. ¶¶ 13-14.

New Mexico's misleading portrayal of the Texas Complaint as seeking a state-line delivery is nothing more than a bare attempt to have the Court ignore the importance of the relationship between the Compact and the Project with respect to Texas' Compact right. The very reason there is no state-line delivery is because the compacting parties agreed that the delivery point should be the Rio Grande Project, which would allow delivery of Texas' apportionment through the operation of the Project by the United States. *See* Tex. Compl. ¶¶ 11, 13; U.S. Compl. ¶¶ 5-7. The Project pre-existed the Compact, and it was therefore recognized and accepted by the Compact drafters that Texas' apportionment and deliveries would be that afforded by the Project and delivered to the Project. *See* Tex. Compl. ¶ 11. The Compact accordingly recognizes that New Mexico's deliveries to the Project, after appropriate accounting, become "useable water" for both Compact and Project purposes, *see* Compact Art. I(k), (l), and do not, as New Mexico wishes, remain water available for New Mexico to further allocate to New Mexico non-Project users.

New Mexico insists it has no "affirmative duty" with regard to delivery of water to Texas. Motion to Dismiss ¶ 3; N.M. Brief at 48. What New Mexico chooses to ignore however, is that it has an

affirmative duty not to violate its delivery obligation by interfering with the right and ability of Texas to receive the delivery through the Project, of its share of Rio Grande water apportioned by the Compact. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987) (stating even "good-faith differences about the scope of contractual undertakings do not relieve either party from performance"). New Mexico essentially argues that it can make its delivery to Elephant Butte Reservoir and then take the water back once released from Elephant Butte Dam. Under New Mexico's view it is permissible for New Mexico to permit New Mexico water users to abscond with Compact water belonging to the Project beneficiaries and due to Texas under the Compact. This is not only contrary to the intent of the parties to the Compact but would lead to an absurd result. The Project and the Compact were intended to allow Texas to receive its Compact apportionment, not to allow New Mexico to develop additional water supplies for New Mexico from its Compact delivery intended for Texas. *See* Memorandum in Support of Motion of the United States to Intervene as a Plaintiff, at 3 (stating the Compact was signed approximately one month after the execution of the 1938 contract among EBID, EPCWID, and the United States, confirming the acreage for each State which would be served by deliveries to the Project by New Mexico); U.S. Compl. ¶ 8. Texas and the United States accordingly assert that this is not what the Compact intended. Tex. Compl. ¶ 18; U.S. Compl. ¶ 13.

The language of the Compact and its relationship to the Project make clear that New Mexico's Compact delivery must be used for the Project, and is not available for New Mexico to reallocate. *See* Compact Art. IV (requiring New Mexico to deliver its Compact obligation at Elephant Butte Reservoir); Art. I(k) (defining "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "above the first diversion to lands of the Rio Grande Project"); Art. I(l) (defining "usable water" as water in project storage). These terms would have no meaning under the Compact if New Mexico could deliver its Compact obligation to the Project and then take it back before it could be placed into the service of the Project for the benefit of the Project beneficiaries and the State of Texas. The Complaints more than sufficiently allege that New Mexico is in violation of the Compact by permitting water users within New Mexico to use the water apportioned to Texas by the Compact.

II. The Complaints of Texas and the United States Present Fundamental Questions Regarding the Interpretation and Enforcement of the Compact and not a Mere Reclamation Law Dispute.

New Mexico's Motion to Dismiss attempts to reframe the significant Compact questions presented in the Texas and United States Complaints as mere disputes arising under federal reclamation law. N.M. Brief at 59. As set forth above, the water supply of the

Project is inextricably linked to the waters apportioned to Texas by the Rio Grande Compact. This does not mean that Texas or the United States fails to state a claim relating to the Compact, or that this case is not within the Court's original jurisdiction. The Compact is necessary to ensure the Project receives its annual supply of water, and the Project is necessary to ensure Texas' Compact apportionment is delivered to users in Texas. New Mexico, however, focuses on the existence of contracts to deliver the Project water to argue no Compact claim is stated by the Complaints.

It is undisputed that Project water is delivered to users in EBID and EPCWID pursuant to contracts, including the 1938 contract and the 2008 Operating Agreement. *See* U.S. Compl. ¶¶ 8, 12. It is further undisputed, as the United States establishes in its Complaint, that a contract is required to "receive deliveries of water, including seepage and return flow, from a Reclamation project," and that the only such contract in New Mexico is between the Secretary of the Department of the Interior and EBID. *Id.* ¶ 12. The existence of the Project, which delivers to Texas its Compact apportionment, does not transmute a Compact dispute into a reclamation law dispute. Rather, this case presents the unique circumstance of interpretation and enforcement of the Rio Grande Compact, which necessarily includes consideration of the Rio Grande Project, releases from Project storage, Project supply, contracts relating to releases and supply, and whether New Mexico is entitled to claim

credit for the delivery of its Compact requirement into the Elephant Butte Reservoir and then permit such water to be removed from the Rio Grande basin below the reservoir for use by New Mexico non-Project water users.

The United States appropriately asserts two distinct interests in this case, both of which are expressly related to New Mexico's Compact compliance (or lack thereof). First, this Court's interpretation of the Compact will affect how the Bureau of Reclamation calculates diversion allocations in determining Project supply. U.S. Motion at 2; U.S. Brief at 5; U.S. Compl. ¶ 14. Second, the United States has a distinct interest in ensuring that non-Project water users, that is users other than EPCWID or EBID, do not intercept or interfere with Project water intended for Project beneficiaries. U.S. Motion at 2; U.S. Brief at 5; U.S. Compl. ¶ 13. The ability of EPCWID, as the Project beneficiary in Texas, to receive its allocation of Project supply unimpeded by users in New Mexico is what Texas bargained for and received under the Rio Grande Compact.

With respect to the first interest, this Court's determination of New Mexico's obligations under the Compact will affect administration of the Project. The Project is currently operated in accordance with the terms agreed to by EPCWID, EBID, and the United States in the 2008 Operating Agreement. The 2008 Operating Agreement defines and protects the rights of EPCWID and EBID to their respective shares of the Project water supply. The United States Complaint

seeks to enjoin New Mexico from allowing non-Project water users to interfere with the delivery of Project water both within New Mexico and to the State of Texas. *See* U.S. Compl. ¶¶ 13-15. The United States alleges that New Mexico has permitted such interference by allowing the interception of both surface water and hydrologically connected groundwater, and that such interception affects the rights of the United States in and to the Project and the ability of the United States to deliver sufficient Project water to EBID, EPCWID and to Mexico. *Id.*

With respect to the second interest, when water users who do not have valid contracts with the Bureau of Reclamation divert and use Project water, the operation of the entire Project is at risk. The Operating Agreement assumes New Mexico's compliance with its Rio Grande Compact delivery obligations. New Mexico's current actions, however, are in derogation of the requirements imposed on it by the Compact, its contract with Texas and Colorado to govern the use by the three sister States of the Rio Grande's waters. *See Texas v. New Mexico*, 482 U.S. at 128 ("[A] compact when approved by Congress becomes a law of the United States, but a Compact is, after all, a contract.") (internal citations, quotation marks, and alterations omitted). The interpretation and enforcement of the Compact must take into account the operation of the Project pursuant to the Operating Agreement. "[T]he equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the

potential benefits from a proposed diversion may be speculative and remote." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982).

As described in Texas' and the United States' Complaints, New Mexico's acts and conduct in failing to comply with its obligations under the Compact significantly impair the operation of the Project and the ability of the United States to perform its contractual obligations to EPCWID. Tex. Compl. ¶¶ 24-25; U.S. Compl. ¶ 14. These distinct interests of the United States and the Compact questions Texas has brought to this Court all relate to interpretation and enforcement of the Compact and do not rely on a reclamation law or contracts. Rather, both the Texas and the United States Complaints seek to interpret and enforce New Mexico's Compact obligations in order that the United States and others can ensure compliance with existing contracts and obligations. Absent Compact compliance by New Mexico, the Project will be undermined and Texas and EPCWID, the Texas Project beneficiary, will not receive the water to which Texas is entitled under the Compact.[3]

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[3] Ironically, in arguing against this Court's acceptance of jurisdiction over the Texas Complaint, New Mexico originally took the position that the United States was an indispensable party to resolve Texas' allegations with regard to Compact violations. *See* New Mexico's Brief in Opposition to Texas' Motion for Leave to File Complaint 31-34. Now that the United States has intervened, New Mexico argues that its presence and the essential issues it raises, improperly expand this Court's original jurisdiction. N.M. Brief at 63-64.

III. Neither the Lower Rio Grande General Stream Adjudication in New Mexico nor State Administration Can Resolve the Fundamental Compact Dispute that Texas and the United States Have Brought to this Court.

New Mexico spends a large proportion of its Motion to Dismiss arguing that the allegations of Texas and the United States regarding Compact violations can somehow readily be resolved in state court through application of state law, primarily determination of the Project right in the state general stream adjudication and state administration. N.M. Brief at 48-64. These arguments are misguided and misconstrue the allegations of both Complaints. New Mexico made these same arguments in its opposition to the Court's acceptance of Texas' Complaint, and they should be rejected now as they were in the Court's consideration of Texas' Motion for Leave to File Bill of Complaint.

Neither Complaint seeks an adjudication or determination of the rights in the Project. Rather, the Complaints set forth the necessary interdependence of the rights and obligations under the Compact, with the operations of the Project, and ask this Court to resolve that issue. As set forth in the Texas Complaint, the Compact water allocated to Texas is in essence Project water and vice versa: "Rio Grande Compact [water] . . . is allocated and belongs to the Rio Grande Project beneficiaries in southern New Mexico and in Texas. . . ." Tex. Compl. ¶ 4. The water

delivered to the Project at Elephant Butte Reservoir is not New Mexico's to allocate in a state general stream adjudication, and thus a general stream adjudication cannot undermine Texas' rights. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (holding the equitable apportionment of an interstate stream by an interstate compact "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact"). Rather, the Rio Grande Compact, an interstate compact with the status of federal law, mandates that the Project right, however adjudicated, cannot be diminished by New Mexico state based water rights authorized under state law. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (stating that no court may order relief inconsistent with an interstate compact).

Moreover, New Mexico erroneously argues that the United States' Project Rights were acquired under New Mexico state law and that therefore state law can dictate the administration and operation of the Project. N.M. Brief at 52-58. However, the United States' rights in the Project were secured for the Project under federal law and the Bureau of Reclamation, not the State of New Mexico, is charged with Project operations. In 1906, and again in 1908, the predecessor to the Bureau of Reclamation, the Department of the Interior United States Geological Survey, Reclamation Service, provided notice to the New Mexico Territorial Irrigation Engineer that the United States had withheld all the unappropriated

waters of the Rio Grande for the federal purposes of the Project. Tex. Compl. ¶ 7. The 1906 Notice stated in part:

> [Y]ou are hereby notified that the United States intends to utilize the following described waters, to wit:
>
> A volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River at a point described as follows:
>
> Storage dam . . . and diversion dams below in Palomas, Rincon, Mesilla, and El Paso valleys in New Mexico and Texas.
>
> It is, therefore, requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.

See N.M. Brief App. 8-10. The 1906 notice was given pursuant to Section 22 of Chapter 102 of the territorial laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico. The language quoted is mandatory, not precatory. The act provided that:

> Whenever the proper officers of the United States authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends

> to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory. . . .

1905 N.M. Laws, ch. 102, § 22.

Louis C. Hill, supervising engineer, sent a second notice to the New Mexico Territorial Engineer dated April, 1908, pursuant to Section 40 of Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, 1907 N.M. Laws, ch. 49, § 40, which stated, in part:

> In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to wit:
>
> All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows:
>
> Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.
>
> It is therefore requested that the waters above described be withheld from further appropriation and that the rights

> and interests of the United States in the premises be otherwise protected as contemplated by the statue above cited.

See N.M. Brief App. 11-13.

The only differences between the 1906 and the 1908 notices were that the 1908 notice: 1) contained no water volume limitation, referring to "All the unappropriated water of the Rio Grande and its tributaries . . . "; and 2) "the proper officers of the United States" had three years from the date of the notice within which to file "plans for the proposed work, in the office of the Territorial Engineer for his information, and no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory. . . ." Such officers did file the plans for the "proposed work" within three years from the date of the notice.

Neither the 1906 nor the 1908 Notice requested or referred to an "appropriation of water," and they were not dependent upon any ruling from the Territorial Engineer. Instead, the notices were simply notifications to the Territorial Engineer, and thereby to the inhabitants of the Territory of New Mexico (and, subsequently, the State of New Mexico), that the United States was withholding all of the water to which it had been entitled pursuant to the Treaty of Guadalupe Hidalgo, between Mexico and the United States, proclaimed July 4, 1848, 9 Stat. 922; as expanded by the Gadsden Treaty between Mexico and

the United States, proclaimed December 30, 1853, 10 Stat. 1031. Pursuant to such treaties, the United States acquired ownership and dominion over all of the present State of New Mexico, including all of the surface and all of the sub-surface (including, without limitation, all minerals and waters).

Subsequently, under the Enabling Act for New Mexico, 36 Stat. 557, ch. 310 (June 20, 1910) New Mexico was allowed to become a state, but subject to all of the terms and conditions of the Enabling Act, the terms of which are incorporated into the 1912 Constitution of the State of New Mexico. The Second clause of the Seventh provision of the Enabling Act provides:

> That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of (the Reclamation Act of 1902) . . . to the same extent as if said State had remained a Territory.

N.M. Const. Art. XXI, § 7. The United States retained and still holds for the benefit of the Project beneficiaries, all of the Rio Grande water which the United States acquired in 1848 and 1853, and which was legally unappropriated by the date of the 1908 notice.

Based on the unique history of the Rio Grande Project, the water supply for the Project is governed by federal law, including the Rio Grande Compact which subsequently apportioned Project water to

Texas as its Compact right. The United States continues to hold rights to the Project water supply, and, acting through the Secretary of the Interior, it can utilize such water in any manner consistent with the Reclamation Act, the Rio Grande Project Act, and the Rio Grande Compact. The United States can, and does, place the water supply into service for the Project through the Project works, and no one else (absent a contract with the United States), has the right to divert, use, or intercept such water unless and until the United States has finished use of the water, including tributary inflow, underflow of the river, return flows, and accretions and has met delivery obligations to Texas and treaty delivery obligations to Mexico. State law, either through adjudication or administration, cannot diminish the rights of the United States to operate the Project and make full use of the Project water supply, or the rights of Texas pursuant to the Compact.

CONCLUSION

For the reasons stated herein, and in support of the responses of the State of Texas and the United States, EPCWID respectfully requests the Court deny the Motion to Dismiss.

Respectfully submitted,

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION[1]

Pursuant to the Court's Orders dated January 27, 2014 and March 10, 2014, on April 30, 2014 New Mexico filed a Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention in this original action. The City of El Paso ("El Paso") submits this *amicus curiae* brief opposing the motion.

INTEREST OF *AMICUS CURIAE*

The City of El Paso, Texas is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its continued growth and prosperity depend upon having an adequate water supply, made up of both groundwater and Rio Grande Project surface water. In order to moderate its reliance on groundwater from the Hueco Bolson and to confront surface water shortages in drought years, El Paso's water management strategy promotes water conservation, maximizes surface water use, increases use of reclaimed

[1] By Resolution adopted at its regularly scheduled meeting on June 10, 2014, the El Paso City Council unanimously approved the City's filing of this *amicus* brief. *Cf.* S. Ct. R. 37.4 (City not required to file motion for leave).

water, and has also developed desalination of brackish groundwater.[2]

The continued availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project ("Project"). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 ("EPCWID") that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies.

Actions by New Mexico that enable and institutionalize increased demands on Project water through unregulated groundwater pumping in New Mexico, affecting the drain water and irrigation return flows that are part of Project water supply, are a cause of serious concern to El Paso and Texas. Protecting the historical operation of the Project as incorporated in Texas' rights under the Rio Grande Compact – Project integrity – is a direct and sustained interest of all Texas users of Project water, including those such as El Paso that have invested heavily to secure contractual rights for this water supply. Addressing these issues is a matter of critical importance to the almost

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[2] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://www.epwu.org/water/water_resources.html.

750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUPPLEMENTAL STATEMENT

New Mexico has not established that the factual allegations pleaded by Texas and by the United States, taken as true, do not plead claims for which legal relief can be granted in this original action. *Cf.* Fed. R. Civ. P. 12(b)(6); S. Ct. R. 17.2. New Mexico's characterization of Texas' and the United States' claims also ignores a great deal of context, regarding the Rio Grande Compact ("Compact"), Act of May 31, 1939, ch. 155, 53 Stat. 785, and related water rights, and regarding New Mexico's own historical treatment of these issues. El Paso therefore offers the following additional background to show the lack of merit in New Mexico's Motion to Dismiss.

I. A Problem of New Mexico's Creation

A. Notable History of New Mexico's Policy and Practice in the Lower Rio Grande

Since Colorado, New Mexico, and Texas entered into the Rio Grande Compact in 1938, groundwater development in the Lower Rio Grande Basin in New Mexico – the area below Elephant Butte Reservoir and down to the New Mexico-Texas state line – has dramatically increased. As the parties have described, the Lower Rio Grande Basin encompasses both the

City of Las Cruces and the irrigable lands in New Mexico with rights to receive an annual allotment of water supply from the Rio Grande Project. Texas Br. Supp. Compl. Appendices A, B. New Mexico's administration of this portion of the basin is at the heart of the Compact claims in this original action.

For decades, one of the regulatory tools available to the New Mexico State Engineer to address the impacts of groundwater development on hydrologically connected surface water has been the "declaration" by the State Engineer of an underground water basin when the area and boundaries of same are reasonably ascertainable. This declaration is the prerequisite for the State Engineer's further oversight and administration of groundwater rights in that basin, including permitting new wells and imposing conditions to protect senior water rights. Indeed, under New Mexico groundwater law, a permit to appropriate underground waters is only required in basins that have been so declared by the State Engineer. *See* NMSA § 72-12-20 (1978). Under this system, the timing of the underground water basin declaration is critically important – unless and until the State Engineer acts to assert regulatory oversight, there are essentially no limitations on groundwater development and the effects of that development.

An early example of basin declaration was the State Engineer's Order Declaring the Rio Grande Underground Water Basin, issued in November 1956, which delineated the portion of the basin now generally referred to as the "Middle Rio Grande," above

Elephant Butte Reservoir to the Colorado state line and including the Albuquerque area. Among the recitals preceding the description of that basin's area and boundaries, the State Engineer expressly recognized that "the waters of said basin are interrelated with the flow of the Rio Grande Stream System, so that such underground waters are a substantial source of the flow of said stream system," and also that "the waters of the Rio Grande Stream System are fully appropriated." New Mexico Office of the State Engineer, Order Declaring the Rio Grande Underground Water Basin (Nov. 29, 1956), at 1.*[3] The State Engineer's accompanying Memorandum explained the purpose, and the catalyst, for such basin declarations under New Mexico law, as follows:

> The State Engineer defines and declares such basins whenever it becomes apparent that regulation is necessary 1) to prevent impairment of existing rights, 2) to insure beneficial use of water, and 3) to provide for an orderly development of ground-water reservoirs.

New Mexico Office of the State Engineer, Memorandum, Subject: Declaration of the Rio Grande Underground Water Basin (Nov. 29, 1956), at 2.* As background regarding the Rio Grande declaration

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[3] Accompanying the filing of this brief, pursuant to Rule 32.3 *amicus* the City of El Paso has submitted a letter to the Clerk of the Court describing additional documents proposed to be lodged with the Clerk, and has indicated with an "*" those materials when quoted herein.

decision, it further described the State Engineer's longstanding awareness of the "complex water problems that beset the State's largest and most populous river valley," and the review of technical papers describing "the interrelationship of the surface and ground waters of the Rio Grande Valley." *Id.* at 3.

Reiterating that basin surface and ground waters are "intimately interrelated parts of a single supply," in which groundwater withdrawals result "ultimately in an equivalent diminution of surface water flows," *id.* at 4, the State Engineer laid out administrative procedures to govern groundwater development while protecting against impairment of existing water rights. Specifically, the State Engineer required that any approved groundwater appropriation be "offset by the retirement of usage under existing surface rights," with the amounts and timelines of such retirement calibrated to assure that "at all times the total irrigation water retired will fully offset the effects of the ground-water withdrawals on the river." *Id.* at 5. Under these administrative procedures, development of groundwater wells to supplement existing water rights would be permitted, with groundwater diversions during times of limited surface water supply. Other water right amendments, including changes of point of diversion, method of diversion (from surface water to groundwater), and place and type of use, "all will be permitted – provided such changes do not impair existing rights." *Id.* at 6. By this analysis and resulting administrative action, the State Engineer utilized basic mechanisms

available under New Mexico law to impose reasonable checks on unfettered groundwater development in the critically important Rio Grande Basin.

Unfortunately, the contrasting treatment of the Lower Rio Grande Basin in New Mexico does not reflect this same diligence on the part of the New Mexico State Engineer. Several decades later, in 1980 the State Engineer (still S.E. Reynolds) finally declared the Lower Rio Grande Underground Water Basin in Doña Ana County, which encompasses the area below Elephant Butte Reservoir and down to the New Mexico-Texas state line, including the Las Cruces area and the irrigated lands within the Elephant Butte Irrigation District ("EBID"). *See* New Mexico Office of the State Engineer, Special Order No. 126-A, In the Matter of State Engineer Special Order No. 126 Declaring the Lower Rio Grande Underground Water Basin in Doña Ana County (effective Oct. 22, 1980).* Just as with the 1956 Order declaring the Middle Rio Grande portion of the basin, this Order recited the predicate "reasonably ascertainable" boundaries known to exist, and that "the surface and underground waters within the boundaries of this basin are interrelated." Special Order No. 126, at 1.[4]

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[4] Special Order No. 126 (September 11, 1980), contains the recitals and boundary description for the declared Lower Rio Grande Basin, promulgated in the nature of a rulemaking. This was the basis for the subsequent notice and hearing resulting in the basin declaration confirmed by Special Order No. 126-A (October 22, 1980).

In contrast to the 1956 Order, however, for the Lower Rio Grande the State Engineer only acknowledged that "new appropriations of water *might* impair existing rights." *Id.* (emphasis added).

On the face of these two basin declarations, and the larger connected context of the Rio Grande Valley as a whole, it is clear that the Lower Rio Grande portion below Elephant Butte Reservoir could have been declared and administered much earlier, but was not. The timing and purpose of the 1980 Order, moreover, is explained in the accompanying memorandum, which opened with a description of the City of El Paso's just-filed lawsuit in federal court challenging the constitutionality of New Mexico's statute on groundwater export. New Mexico Office of the State Engineer, Memorandum, Subject: Lower Rio Grande (Sept. 10, 1980) ("1980 OSE Memorandum")*; *cf. City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983). Citing El Paso's well applications and concerns about "a rash of speculative drilling" resulting from publicity over the El Paso lawsuit, the agency memorandum recommended basin declaration "to protect existing water rights and insure orderly development of the ground water resource" in the Lower Rio Grande. 1980 OSE Memorandum, at 1. Approxir tely six weeks following the filing of El Paso's l..vsuit the basin was declared and, at least theoretically, subject to administration that would protect senior rights to Project water supply.

Perhaps this declaration was better late than never; however, the result of this substantial delay in

declaring the Lower Rio Grande Basin was that extensive groundwater development by New Mexico entities continued unchecked for many years. By the time of the 1980 declaration, nearly all of the irrigators within EBID had already completed supplemental groundwater wells, which are not subject to the post-declaration offset requirements under declared basin administration. Even after the 1980 declaration, for many years the State Engineer granted permits for wells to supplement Project surface water for irrigation of Project land.

In addition to all of these private supplemental wells, in 2003 EBID itself obtained from the State Engineer a short-term emergency authorization for multiple supplemental wells, intended to make up the shortage in Project surface water supply during ongoing drought conditions. This EBID authorization was for an amount up to 271,920 acre-feet of groundwater, for the irrigation of up to 90,640 acres of EBID acreage with rights to Project water supply. *See* Office of the State Engineer, Memorandum (from E. Fuchs, Lower Rio Grande Basin Supervisor, to John R. D'Antonio, State Engineer), Emergency Application for Permit for Supplemental Wells (May 15, 2003) ("Fuchs Memorandum").* The State Engineer's staff analysis of the EBID emergency application warned that the potential for EBID irrigators to be able to replace their entire annual Project supply with groundwater produced from within the Lower Rio Grande Basin would exacerbate the effects of already

excessive, unregulated pumping that affects connected Rio Grande surface flows. *Id.* at 11.

Over the same time period prior to the 1980 declaration of the Lower Rio Grande Basin, while groundwater use for irrigation was increasing the historical data also show a dramatic increase in municipal and industrial water use by the City of Las Cruces. Around the time of the (1956) Middle Rio Grande Basin declaration, Las Cruces was using approximately 2,500 acre-feet per year; by the time of the (1980) Lower Rio Grande Basin declaration, that amount of annual use had more than doubled, to approximately 6,000 acre-feet per year. Peggy Barroll, Hydrologist, New Mexico Office of the State Engineer, *Tools for a New Era in Water Management* (PowerPoint presentation before the Lower Rio Grande Water Users Association, Aug. 19, 2005) ("Barroll PowerPoint").* Las Cruces' water supply now comes solely from groundwater wells located in the Lower Rio Grande Basin. Las Cruces Amicus Br. at 2.

B. History of New Mexico Public Officials' Concerns Regarding Rio Grande Compact Noncompliance

In stark contrast to New Mexico's assertions in this original action – that the Rio Grande Compact imposes no obligation on New Mexico vis-à-vis Texas other than its required deliveries of Project water into Elephant Butte Reservoir – there is significant contrary history regarding New Mexico's position. For

more than a decade, the Office of the State Engineer ("OSE") has recognized New Mexico's problem with the Lower Rio Grande, and the potential for Texas litigation under the Rio Grande Compact based on the impacts of groundwater depletion in the Lower Rio Grande and resulting impairment of the historical operation of the Rio Grande Project, *i.e.*, Project integrity. The New Mexico Legislature has also recognized the imperative of compact compliance, in providing OSE with further rulemaking authority for alternative priority administration of water allocations in basins (like the Lower Rio Grande) where adjudications remain pending. Over time, there has been a pattern of recognition of New Mexico's looming problem, and sporadic efforts to address it.

As described above, OSE approved an emergency application by EBID for supplemental wells to augment or replace Project water supply during drought conditions. In an expansive memo analysis directed to the State Engineer, the Lower Rio Grande Basin Supervisor described the implications, of the EBID application and the situation generally, as follows:

> Given the interrelated nature of the surface and groundwater system in question, groundwater diversions of the magnitude potentially necessary to serve the [EBID] application or that may occur for years to come despite the application as discussed herein are such that much of the available or remaining mainstem flows of the Rio Grande below

> Caballo Reservoir, *beginning with drain flows within the EBID*, could be negatively and substantially affected almost immediately, although it is uncertain how severe these effects might be. Should drought conditions persist on a multi-year, continuous basis and the supplemental pumping in question continues at or near full capacity, the manner in which the State of Texas will receive a proportional share of Rio Grande Project water and the quality associated with such in future years remains largely uncertain. In the absence of a clear plan of replacement and/or state line delivery strategy and working agreement with the EBID under these circumstances, it must be assumed that the State of New Mexico could eventually be met with a challenge *under the Rio Grande Compact*. However, because most of the EBID (~90%) already has on-farm access to private wells for supplemental purposes and will in all likelihood continue to use them at or near full capacity, the potential for such a challenge may exist regardless of the action taken on the [EBID] application.

Fuchs Memorandum, at 2 (emphasis added); *id.* at 3 (noting "increased potential for a challenge under the Rio Grande Compact"). The Basin Supervisor further cautioned that "[d]espite the *popular belief* that New Mexico's obligations to Texas under the Rio Grande Compact essentially end at the Elephant Butte Reservoir, . . . " if drought conditions persisted it was not clear how Texas would receive its proportional

share of Project water, and thus "the potential for such a challenge and a subsequent, very expensive tour of the US [sic] Supreme Court may exist regardless of the action taken on the EBID's emergency application." *Id.* at 12 (emphasis added). The Basin Supervisor provided a meaningful insight into the challenges faced by New Mexico, stating that "[m]ost efforts of this office and possibly those at the state level to discontinue this [supplemental groundwater pumping] in the field under the current drought conditions will very likely result in mayhem, significant media attention and much political posturing." *Id.* at 2. In the light of these and later statements from within the OSE, New Mexico's current insistence on the lack of any Compact obligation to protect the Rio Grande Project's operational integrity rings hollow.

That same year as the EBID emergency application described above, the New Mexico Legislature took action to provide a means of alternative priority administration for basins such as the Lower Rio Grande with still pending adjudication processes. The stated need for this legislation is telling:

> The legislature recognizes that the adjudication process is slow, *the need for water administration is urgent, compliance with interstate compacts is imperative* and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

NMSA § 72-2-9.1.A (1978) (emphasis added). The statute goes on to require the State Engineer to adopt rules for such priority administration, intended to govern an "Active Water Resource Management" ("AWRM") program administered by OSE.

The New Mexico State Engineer's (then John D'Antonio) subsequent public presentation in 2005 addressing "Active Water Resource Management in the Lower Rio Grande" appears to confirm all the essential allegations of Texas' Complaint in this original action. *See* John D'Antonio, PE, New Mexico State Engineer, *Tools for a New Era in Water Management* (PowerPoint presentation before the Lower Rio Grande Water Users Association, Aug. 19, 2005) (the "D'Antonio PowerPoint").* With the framework of the 2003 legislation, AWRM and the related rulemaking process, Mr. D'Antonio addressed the extent of the problem resulting from groundwater pumping by junior users in the Lower Rio Grande, with surface water fully appropriated. He noted the extent of growing demand for both irrigation and municipal and industrial uses in the area, *id.* at 6, and estimated that "[g]roundwater pumping for irrigation use alone may be as high as 50,000-100,000 AFY in full project supply years[, and] 200,000-300,000 (?) AFY in low project supply years." *Id.* at 7. He presented two problems: First was the "Heavy Reliance on Groundwater While Instituting Few Controls on it," which acknowledged the general seniority of surface water rights in the Lower Rio Grande and summarized data from the late 1950s to the mid-1970s showing that

groundwater pumping "reduces river flow." *Id.* at 8. Second was the "Claims that New Mexico Groundwater Pumping is Affecting Surface Water Flows," which acknowledged the senior surface water right of the Rio Grande Project and capsulized Texas' claim regarding New Mexico's overuse due to effects on surface water. *Id.* at 9.

Perhaps most notably in contrast to New Mexico's current position denying any Compact obligation as pleaded in Texas' Complaint, the State Engineer warned of the risk of an original action in this Court that could result in remedies to address New Mexico's "post-Compact groundwater pumping," *id.* at 10, and he invoked the 2003 New Mexico statute as a response to this risk of compact noncompliance. *Id.* at 11 ("Legislators have admonished the State Engineer not to let the Pecos River history repeat itself anywhere, including on the Lower Rio Grande"). Against this backdrop, Mr. D'Antonio addressed the potential for local cooperation in forms of alternative administration, and also outlined the AWRM rulemaking process relating to the Lower Rio Grande Basin.[5]

A second State Engineer presentation regarding AWRM for the Lower Rio Grande Basin was made at the same August 2005 meeting, in which OSE

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[5] Due to litigation, to date AWRM has not been implemented in the Lower Rio Grande. *But see Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012) (upholding the constitutionality of the AWRM rulemaking authority provided in the 2003 statute).

Hydrologist Peggy Barroll provided a more detailed, quantitative explanation of the competing groundwater demands and related hydrology (the "Barroll PowerPoint," cited above). Among "[t]he Facts We Must Deal With," Dr. Barroll noted that "[g]roundwater and surface water behave as a single resource," and that "[m]ost pumping [was] already established" by the time the prior State Engineer declared the state's jurisdiction over most of the Lower Rio Grande Basin groundwater. Barroll PowerPoint, at 8. Directly pertaining to Texas' claims in this original action, she explained how increased groundwater pumping "dries up" the drain flows that are "Part of the Water Supply of the Rio Grande Project." *Id.* at 10-11. More particularly, she noted that "[h]istorically drain flows have added about 20% to Project diversions," and that "[w]hen the drains are dry, the Rio Grande Project water supply is reduced and Project water cannot be delivered efficiently." *Id.* at 11. This relationship of drain flows as part of Project water supply and Project historical operation, incorporated into the Rio Grande Compact in 1938, is the Project integrity that Texas seeks to protect in this original action. Compl. at ¶¶ 18-20, 24-26.

Dr. Barroll described the State Engineer's (district-specific) AWRM regulations as the means to enforce against over-diversions and also to curtail junior groundwater rights in priority, "to protect the historical operations of the Rio Grande Project[, and] to ensure protection of senior surface water rights owners." *Id.* at 14. More specifically, OSE had set as the

"priority administration target" for the Lower Rio Grande the "historical operating efficiency of the Rio Grande Project since the 1950s (the D2 curve),"[6] until such time as there was a new operating agreement for the Rio Grande Project, *i.e.*, among the United States and the two irrigation districts in New Mexico and Texas. *Id.* at 15. The State Engineer's then-proposed AWRM regulations would have curtailed junior groundwater "if necessary, to ensure that the Rio Grande Project can operate at the level of efficiency described by D2." *Id.* at 23. The significance of the State Engineer's reliance on the Bureau of Reclamation's D2 curve for this regulatory purpose is the recognition that New Mexico has the responsibility to protect the Project's historical operating efficiency reflected in the D2 curve – the historical operating condition that "has been the basis of Rio Grande Project operations for 50 years." *Id.* at 24.[7]

Both Mr. D'Antonio's presentation and Dr. Barroll's more technical presentation addressing New Mexico's

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[6] As Dr. Barroll succinctly laid out in her presentation, the "D2 curve" is a plot of the Project's efficiency, using data from the years 1951-1978, and comparing amounts of water released from Caballo Reservoir for the Rio Grande Project to amounts of Project supply (*i.e.*, divertible water at river headings), which supply is comprised of releases from Project storage, return flows, and any useable inflows to the Rio Grande. Barroll PowerPoint, at 16-17.

[7] El Paso does not take the position that the D2 curve is necessarily the proper standard for protecting Project integrity. Rather, the significance here was the State Engineer's recognition of New Mexico's Compact obligation.

Lower Rio Grande problem were grounded in the State Engineer's clear understanding of New Mexico's obligation to protect Project integrity, as a matter of compliance with New Mexico's obligations under the Rio Grande Compact. With this history of its own legislative and administrative action, New Mexico should not now be heard to claim that Texas has no legal claim under the Rio Grande Compact.

II. Limitations of New Mexico Proceedings as Protection for Texas' Compact Interests

Texas and the United States (then as *amicus curiae*), overcoming New Mexico's opposition, have already demonstrated that this Court, in its original jurisdiction, is the only proper and adequate forum to hear their Compact claims involving preservation of Project integrity. New Mexico's continued argument that its own state laws and proceedings provide sufficient, or even exclusive, remedies to protect Texas' and the United States' interests should again be rejected by denying New Mexico's Motion to Dismiss.

A. Priority Call by the United States

New Mexico suggests in its Motion to Dismiss that the proper and adequate mechanism for the United States to protect its Project water rights is to make a priority call based on its New Mexico appropriations (1906 and 1908), and proceed through New Mexico's administrative processes for such a call or other remedies. N.M. Br. at 21-22, 39, 56-57; *cf.* NMSA §§ 72-1-1 to -12 (1978); *City of Albuquerque v.*

Reynolds, 379 P.2d 73 (N.M. 1962). While that may be a simple and appealing solution in theory, in fact there are very real practical limitations that render a priority call an unlikely solution for the United States (and thus for all the Texas irrigators and entities that have rights to receive Project water). Most recently, these have been raised in pleadings in the Lower Rio Grande Adjudication ("LRG Adjudication") itself, under Stream System Issue 104, regarding the United States' Interests. The presiding judge recently denied all motions for summary judgment regarding the Project priority date or dates, with further proceedings on this issue scheduled. *See* Order, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Feb. 17, 2014) at 4.

Relatedly, the parties in the LRG Adjudication have filed pleadings regarding whether the issues currently pending in Stream System Issue 104 should be stayed pending further proceedings in this original action. The response filed by EBID raises two important concerns that call into question the feasibility of a priority call to protect the United States' Project water rights under New Mexico state law. Defendant EBID's Response to Joint Motion to Stay Proceedings and Brief in Support, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (May 15, 2014).* First, based on the court's prior ruling dismissing the United States' claim to groundwater as part of the Project water rights,[8] EBID correctly

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[8] Order, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Aug. 16, 2012) at 8.

notes that the portion of Project supply comprised of the seepage and return flows necessary for Project function "has not been quantified by the [adjudication] Court and will not be protected by a final decree, and instead will be left for determination in an administrative venue." *Id.* at 3; *see* LRG Adjudication, August 16, 2012 Order, at 6-7.

Second, EBID points to the State Engineer's "position on the Lower Rio Grande where lead counsel for the OSE has consistently noted that a priority call made in the Lower Rio Grande would be futile." *Id.* at 5. For both these reasons – the incomplete scope of Project water rights, not including the return flows that assure Project integrity, and the State Engineer's own position regarding the efficacy of a priority call – a priority call through New Mexico administrative procedures is clearly not a sufficient mechanism to protect the Project's operational integrity incorporated into the Compact apportionment.

B. Lower Rio Grande Adjudication

Even apart from the adjudication court's treatment of issues in Stream System Issue 104, various other decisions and positions taken to date collectively make clear that the LRG Adjudication is not a forum in which Texas' interests, in Project integrity as underlying Texas' rights under the Compact, can be protected. Instead, a central theme is emerging in that proceeding, for generous recognition and even maximizing of New Mexico parties' water rights while

limiting Project rights. A few notable examples well illustrate how the LRG Adjudication is working to the detriment of Texas' rights.

First, the City of Las Cruces has obtained an agreed subfile order that positions it with maximum diversion rights and senior priority, with recognition of 39 supplemental groundwater wells for the City of Las Cruces for municipal and related uses, all with a priority date of 1905. *See* Subfile Order, filed in *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, Subfile No. LRN-28-011-0078-A (Aug. 31, 2005).* The total authorized diversion from this series of supplemental wells is 21,869 acre-feet per year, even though the 1905 priority date extended to the entire series of wells was based on a single Las Cruces well drilled by the City at that time.

Second, New Mexico State University (NMSU), another major non-Project water user and also located in Las Cruces, has obtained very favorable treatment reflected in the Offer of Judgment made by New Mexico and accepted by NMSU. *See* Offer of Judgment, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Mar. 9, 2007).* NMSU would be recognized senior priority rights in numerous existing wells, with the ability to perfect the remainder of the potentially authorized diversion by beneficial use in future years, and expansive purposes and places of use, including some authorized use that can be supplied to the City of Las Cruces. Other combined rights of underground water and surface water also would have seniority (1890 for

groundwater and 1906 for surface water), with the authorized amounts to be determined in future proceedings.

A final example is the claim by EBID irrigators who are seeking the same priority as the Rio Grande Project for their supplemental irrigation wells. While that issue is as yet unresolved, conflating the priority of supplemental groundwater wells that augment or replace Project surface water allotments with the priority of Project surface water rights under New Mexico law would effectively eliminate the priority advantage of Project water rights vis-à-vis a substantial portion of the groundwater production in the Lower Rio Grande. With as many as 90% of EBID irrigators already having supplemental wells, if they are given the same priority as Project water rights and the United States (thus also Texas entities and irrigators) are forced to rely on priority calls, there is no feasible way to make this work. With these types of determinations being made, the approach of the adjudication court seems to assure that there will not be sufficient water to both maintain Project integrity and honor all the New Mexico rights being recognized.

SUMMARY OF ARGUMENT

New Mexico's Motion to Dismiss should be denied. Under a Rule 12(b)(6) analysis, Texas and the United States both clearly survive dismissal at this stage,

because both have pleaded factual claims showing entitlement to declaratory and injunctive relief. Compl. at ¶¶ 10-11, 18-20, 24-26; U.S. Compl. Interv. at ¶¶ 11-15. Texas' Compact claim is based on the operational integrity of the Rio Grande Project as it existed and was incorporated into the equitable apportionment between New Mexico and Texas under the Rio Grande Compact. It is that New Mexico obligation, not to dry up the drain water and return flows historically integral as part of Project functioning, that gives rise to this original action.

The flawed underpinnings of New Mexico's Motion to Dismiss are exposed, by New Mexico's history of allowing unregulated groundwater production to impact Project integrity, by prior inconsistent legal positions taken by New Mexico officials regarding the nature of its Compact obligations to Texas, and by the manner in which New Mexico characterizes Texas' and the United States' Complaints in order to assert that no legal relief could be granted.

ARGUMENT

I. New Mexico's Motion to Dismiss Side-Steps Texas' Actual Complaint.

A. Basis for Texas' Compact Claim

In order to contend that Texas' and the United States' Complaints should be dismissed under a Rule 12(b)(6) analysis, New Mexico (and Las Cruces, as *amicus*, both) have created straw-men for Texas'

Compact argument, and then proceed to dismantle them without addressing Texas' valid complaint. Most of New Mexico's argument supporting its Motion to Dismiss is framed in terms of three supposed claims: 1) that Texas asserts a state-line delivery obligation of New Mexico under the Compact; 2) that Texas claims a breach of a "1938 Condition" under the Compact; and 3) that Texas (and also the United States) claim New Mexico has a Compact duty to protect Reclamation's contract deliveries of Project water. N.M. Mot. Dismiss at 1-2; N.M. Br. at 20-22, 24-25, 40-41, 48-49; *see also* Las Cruces Amicus Br. at 4, 9, 10, 14-16. As addressed more fully in Texas' response brief, however, New Mexico purposefully reshapes Texas' (and the United States') claims in order to refute them. Consideration of their claims actually pleaded, together with the broader factual and legal context presented herein and by Texas' response, shows that the Motion to Dismiss should be denied.

The Rio Grande Compact has no quantified state-line delivery obligation for New Mexico deliveries to Texas, and Texas has not suggested that it does.[9] However, the Rio Grande Project's historical operation and the nature of the Project's operational integrity,

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[9] Neither does Texas claim that a "1938 Condition" governs the Compact parties' obligations, such as the 1947 Condition that is expressly imposed as part of the Pecos Compact between New Mexico and Texas. *See* Pecos River Compact of 1949, 63 Stat. 159; *Texas v. New Mexico*, 462 U.S. 554 (1983).

established at the time of Compact adoption in 1938 and fundamental to the equitable apportionment negotiated by the Compact states, does give rise to Texas' Complaint. Compl. at ¶¶ 11, 18-19. The Rio Grande Compact, and Texas' equitable share of the water, depends upon the integrity of the Project, namely the availability and connection of drain water and return flows from Project irrigation that are essential to Project water supply and operation. Without this Project integrity, no equitable apportionment is accomplished by the Rio Grande Compact, as between New Mexico and Texas. *Cf.* Rio Grande Compact, opening statement of Compact purpose, App. to Compl. at App. 1. Project integrity existing and relied upon when the Compact was entered into is the basis for New Mexico's obligation and Texas' Complaint. As Texas argues in its response, both the express terms of the Compact and the operation of the Project – already established for several decades by 1938 – limit New Mexico's jurisdiction over waters in the Lower Rio Grande. *Cf. New Jersey v. New York*, 523 U.S. 767 (1998) (silence of a compact may signify drafters' intent to rely on commonly understood facts and settled law).

New Mexico relies repeatedly on statements quoted from several letters to or from Texas' Compact Commissioner in 1938 (Frank B. Clayton), as support for its interpretation of Compact obligations. N.M. Br. at 11-14, 34-36, 43-44; App. to N.M. Br. at 25-32. In summary, Mr. Clayton described the rationale for setting New Mexico's delivery point at Elephant

Butte Reservoir, in terms of United States' control of Elephant Butte Dam, the geographical nature of the border and cross-border irrigation ditches, and the contractual relationships among the United States and the two irrigation districts. None of the reasons he invoked, however, detract from Texas' Compact claim; rather, these references to established, pre-Compact facilities and contractual relationships reflect an assumption that the Project's operational integrity would be maintained under the Compact.

B. No "Federalization" of State Water Rights and Administration

Las Cruces in its *amicus* brief supporting New Mexico's Motion to Dismiss also argues that the United States' legal theory in this original action would effectively "federalize" the administration of New Mexico state water rights. Las Cruces Amicus Br. at 10-11, 17-20.[10] This argument, however, is misplaced both because it fails to recognize the proper

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[10] Las Cruces' characterization of the "federalization" of New Mexico water rights also paints a far more dire picture of its own situation than what really exists. Las Cruces Amicus Br. at 4, 10-11. Preserving Project integrity under the Compact may mean that Las Cruces' groundwater pumping is limited, which may mean that Las Cruces needs to purchase Project water as part of its water supply. *Cf.* Act of February 25, 1920, 31 Stat. 451. Under this same federal statute, El Paso contracts with the United States and EPCWID to purchase virtually all of the surface water it receives, and is pleased to have this means of obtaining needed additional municipal supply.

relationship of Compact rights and obligations vis-à-vis other state law water rights adjudicated by New Mexico courts, and because the approach argued for in the United States' Complaint in Intervention does not purport to evade otherwise applicable federal reclamation laws.

First, the Rio Grande Project water rights encompassed in the Compact cannot be undermined by adjudication of a priority date for the Project that ignores the effect of the Compact on New Mexico's responsibility to ensure its Compact obligations are satisfied. Under this Court's precedent, those Compact obligations are superior to the rights of other Lower Rio Grande appropriators, regardless of the priority dates adjudicated under New Mexico state laws. An agreement made by compacting states for equitable apportionment of an interstate stream "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-06 (1938); *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36 (Ct. App. 1993) (citing *Hinderlider*).

Second, the United States' position in this original action, and as it relates to the United States' participation in the Lower Rio Grande Adjudication, is not an attempt to evade Section 8 of the Reclamation Act, 43 U.S.C. § 383, which is the general recognition under federal reclamation law of deference to state laws relating to water control, appropriation,

use and distribution, or the McCarran Amendment, 43 U.S.C. § 666, under which the United States waives sovereign immunity for purposes of state water rights adjudications. Both of these key provisions governing the United States' role in water rights administration are still valid and applicable, to the extent they are not inconsistent with the Rio Grande Compact.

II. New Mexico's Motion to Dismiss Ignores the Prior Acknowledgment of New Mexico Officials of a Compact Obligation to Project Integrity.

New Mexico's Motion to Dismiss should be denied for the additional reason that New Mexico now takes a position on Compact interpretation that is contrary to the prior established position of New Mexico on this issue. Over a period of years as the problem of groundwater overproduction in the Lower Rio Grande Basin continued to grow, the New Mexico State Engineer developed and publicized a technical and legal position that actually supports Texas' claims in this original action. That is, not only has the rampant groundwater depletion in the Lower Rio Grande clearly affected Project operation by reducing or even drying up hydrologically connected seepage and drain flows, but because this impacts the Project function as historically operated, New Mexico is vulnerable to precisely the Compact-based challenge brought by Texas and supported by the United States in this original action. *See generally* D'Antonio PowerPoint

(2005); Barroll PowerPoint (2005); Fuchs Memorandum (2003). As the problem reached critical proportions, the New Mexico Legislature took action in 2003, also emphasizing the imperative need for compact compliance. NMSA § 72-2-9.1 (1978).

Although New Mexico's Motion to Dismiss is predicated upon its insistence that its Compact obligations end when water is delivered into Elephant Butte Reservoir, N.M. Br. at 15, El Paso would point out that this has not always been New Mexico's position. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), when El Paso sought to produce and export groundwater from New Mexico for use in El Paso, New Mexico argued that the Rio Grande Compact apportioned the surface waters of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related groundwater below Elephant Butte. *Id.* at 382. Further, New Mexico argued that the Rio Grande Project's division of water released from Elephant Butte Reservoir operated to apportion between Texas and New Mexico water not expressly apportioned by the Compact. *Id.* at 386. For these reasons, New Mexico asserted that El Paso could not take groundwater from New Mexico without violating the Rio Grande Compact.

The district court in *City of El Paso v. Reynolds* ruled against New Mexico's construction of the Rio Grande Compact, but its ruling does not detract from Texas' current cause of action. In that case, New Mexico was arguing that the district court lacked jurisdiction because the case involved a Compact

construction issue and Colorado, Texas and the United States were indispensable parties. *Id.* at 382. The district court, however, ruled that the Compact signatories were not indispensable parties and "[n]ot being parties to this action, they are not bound by the judgment herein." *Id.* Moreover, the court expressly stated:

> Contrary to defendants' contention, a decision that the compact does not apportion the river below Elephant Butte does not mean that New Mexico, having made its delivery, could undermine it by pumping down the surface flow of the river below the point of delivery. *This opinion does not address that issue at all.*

Id. at 386 (emphasis added). Thus, *City of El Paso v. Reynolds* shows that New Mexico has previously argued precisely the Compact construction suggested by Texas' Complaint and that the rejection of this argument by the district court did not address the merits of New Mexico's argument and provides no precedent for this Court hearing Texas' Complaint.

It appears that there has been a change in administration within New Mexico from which the State Engineer no longer acknowledges New Mexico's need to protect Rio Grande Project deliveries to Texas against the impacts of expansive groundwater pumping in the Lower Rio Grande Basin. Not only has this position shifted, but now also the New Mexico Attorney General is challenging the 2008 Operating Agreement entered into by EBID, along with the

United States and EPCWID in Texas, rather than supporting and enforcing this agreement. *See New Mexico v. United* States, No. 11-CV-0691 (D.N.M. filed Aug. 8, 2011). In order to protect Project deliveries to EPCWID, the Operating Agreement effectively reduces the delivery of Project water to EBID by an amount needed to make up for the impact of New Mexico groundwater pumping on deliveries of Project water to EPCWID. Texas' Complaint is based on the Compact parties' understanding that the drain water and return flows from irrigation within EBID are a critical component of the Project's operational integrity, and part of the equitable apportionment to Texas under the Rio Grande Compact.

CONCLUSION

For the reasons set forth above, as well as those set forth in the responses of Texas and of the United States, New Mexico has not established that Texas' Complaint or the United States' Complaint in Intervention fail to state claims upon which relief can be granted. New Mexico's Motion to Dismiss should be denied.

Respectfully submitted,

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss Complaint

BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS AMICUS CURIAE IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS

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BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS AMICUS CURIAE IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS

INTEREST OF AMICUS CURIAE HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1[1]

The Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), a conservation and reclamation district of the State of Texas established under Article XVI, § 59, of the Texas Constitution, holds rights to water from the Rio Grande Project (Project). HCCRD provides that water to farmers within its jurisdiction in Hudspeth County, Texas, for irrigation use.

As a result of New Mexico's actions in violation of the Rio Grande Compact (Compact), HCCRD receives much less of the water to which it is entitled, and much less water than it would receive if not for such violations.

Accordingly, HCCRD has a significant interest in having the Court deny *New Mexico's Motion to*

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[1] This brief was not authored in whole or in part by counsel for any party, and no party or parties' counsel has made any monetary contribution intended to fund the preparation or submission of this brief. By letter from undersigned counsel, counsel of record for the parties in this case received notice of HCCRD's intent to file this brief.

Dismiss Texas' Complaint and the United States' Complaint in Intervention, filed on April 30, 2014 (Motion to Dismiss), so that the Court may address the merits of the dispute presented, and so that New Mexico may be made to cease its violations of the Compact.

At an earlier stage of this proceeding, HCCRD filed its *Brief of Hudspeth County Conservation and Reclamation District No. 1 as Amicus Curiae in Support of Plaintiff's Motion for Leave to File Complaint* ("HCCRD Brief in Support of Motion to File Complaint"). The primary purpose of the HCCRD Brief in Support of Motion to File Complaint is to explain the history and nature of HCCRD's interest in water from the Project and how those interests are being affected by the diversions of water that are being allowed to occur by New Mexico in violation of the Compact. HCCRD incorporates herein by reference its earlier HCCRD Brief in Support of Motion to File Complaint, including all of the assertions and arguments in that brief.

SUMMARY OF ARGUMENT

The purpose of this amicus curiae brief is to correct New Mexico's misleading suggestion that the only user of Project water in Texas is the El Paso

County Water Improvement District No. 1 (EPCWID).[2] HCCRD also has rights to the Rio Grande via permit from the State of Texas and water from the Project under its Warren Act contract with the United States. HCCRD's ability to divert and use such water is being harmed by the actions of New Mexico in violation of the Compact.

In asserting that the remedy for water not being delivered to Texas is through legal recourse against the United States Bureau of Reclamation (Reclamation), New Mexico again fails to recognize HCCRD's interests. EPCWID and HCCRD have distinct interests

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[2] Under the rules of this Court, no motion for leave to file an amicus curiae brief is necessary if the brief is presented "on behalf of a city, county, town *or similar entity* when submitted by its authorized law officer." SUP. CT. R. 37.4 (emphasis added). As noted above, amicus curiae HCCRD is a conservation and reclamation district of the State of Texas, created under Article XVI, § 59, of the Texas Constitution. Such districts are "political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Bennett v. Brown County Water Improv. Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 206 (2009); *El Paso County Water Improv. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *reformed in accordance with opin.*, 243 F.2d 927 (5th Cir. 1957); *Kirby Lake Development, Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 (Tex. 2010); *Willacy County Water Control & Improv. Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944). HCCRD is therefore covered under Rule 37.4. Moreover, because undersigned counsel is HCCRD's authorized law officer for the purpose of this case, no motion for leave (or consent) is necessary for HCCRD to file this amicus curiae brief.

at stake, which are adversely affected by actions taken by New Mexico in violation of the Compact, and which require protection by the State of Texas. It is up to the State of Texas to ensure that HCCRD's interests, along with EPCWID's interests, are protected through this original action.

ARGUMENT

I. HCCRD, a political subdivision of Texas responsible for providing water for farmers within Hudspeth County, has rights to water from the Project that are being harmed by New Mexico's violations of the Compact.

HCCRD is a political subdivision of the State of Texas located in Hudspeth County and containing 18,618 irrigable acres. HCCRD is responsible for providing water for irrigation to farmers within its jurisdiction in Hudspeth County, Texas. HCCRD receives water from the Project. It holds rights to divert water from the Rio Grande based on a permit from the State of Texas, and has the right to receive water from the Project based on its Warren Act contract with the United States. These rights have been recognized in a judicial decree adjudicating the rights to water in the Upper Rio Grande in Texas. HCCRD may also use the bed and banks of the Rio Grande to convey water from the Project. HCCRD's Amicus Brief in Support of Motion to File Complaint at 3-11. HCCRD's rights to this water are being

harmed by New Mexico's violations of the Compact. Id. at 11.

II. By asserting that the remedy for water not being delivered to Texas should be addressed through legal recourse against Reclamation, New Mexico fails to recognize HCCRD's interests.

New Mexico's Motion to Dismiss refers to the right of EPCWID to the delivery of Project water from Reclamation, and repeatedly asserts that any remedy relating to the failure of such deliveries to occur should be addressed through legal recourse against the United States.[3] In doing so, New Mexico fails to acknowledge that New Mexico's violations of the Compact do not only affect EPCWID and Elephant Butte Irrigation District – the original Project beneficiaries – but the State of Texas generally including HCCRD.[4]

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[3] New Mexico asserts this faulty premise for the purpose of rearguing that alternative fora exist to resolve the dispute raised by the Texas complaint. That position remains incorrect and was denied by the Court when it granted Texas' Motion for Leave to File Complaint.

[4] For example, New Mexico refers to EPCWID as the "Texas District" and states that "[w]hen EPCWID needs water to be delivered to the state line, it calls for that water from Reclamation, and if available, that water is released from the Project." Brief in Support of New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention at 56, 60.

New Mexico's Motion to Dismiss fails to recognize the entirety of Texas' interest in Rio Grande water. In particular, it fails to acknowledge the existence of HCCRD's rights.

III. This case is not solely about EPCWID's rights.

The State of Texas is seeking relief in this original action pursuant to its rights under the Compact, and not pursuant to EPCWID's contract with Reclamation.

A. The Compact makes clear that its provisions are meant to secure water supply on the Rio Grande in the area that includes HCCRD.

The Compact states, in its first paragraph, that its provisions are "with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas." Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (Motion for Leave to File Complaint, App. 1). Water apportioned by the Compact to Texas is allocated, in Texas, pursuant to Texas law. Pursuant to its Warren Act contract with the United States, HCCRD receives a portion of the water allocated to Texas by the Compact.

B. HCCRD has Rio Grande interests that are distinct from those of EPCWID and those interests were taken into account in negotiating the Compact.

HCCRD's water rights derive from two sources, both of which are distinct from EPCWID's contract with the United States. First, HCCRD is authorized to use up to 151,902 acre-feet per year of water from the Project pursuant to a December 1, 1924 Warren Act contract between HCCRD and the United States.[5] Second, HCCRD has the right to divert up to 27,000 acre-feet of water from the Rio Grande in El Paso and Hudspeth Counties to irrigate lands as set forth in Permit No. 236A issued by the Texas Commission on Environmental Quality (TCEQ) and confirmed via Texas' Upper Rio Grande Adjudication by Certificate of Adjudication No. 23-5944.

Reliable sources indicate that HCCRD's interests in the Rio Grande were taken into account and helped shape Texas' position in the negotiations leading to the Compact. The Rio Grande Joint Investigation Report recognized the dependence of the irrigators within HCCRD upon water from the Project and included the water needs of those irrigators in its assessment of the diversions from Elephant Butte

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[5] HCCRD's Warren Act Contract with the United States was amended in 1951. The 1951 amendments added language specifying that the United States could deliver seepage or drainage water from land irrigated within the EPCWID, via canal, to HCCRD.

Reservoir necessary to supply that stretch of the Rio Grande *between the reservoir and Fort Quitman.*[6] The Report noted the importance of the division between the "Upper Rio Grande" above Fort Quitman and the "Lower Rio Grande" below Fort Quitman as follows:

> With respect to usage of water and the problems concerned with that usage, the river is divided into two distinct sections at Fort Quitman, or at the narrow gorge a few miles below. Above this nearly all the water of the river is being consumed by irrigation in Colorado, New Mexico, Texas, and Mexico. Below, in the lower basin, the river develops its flow mainly from tributaries in Mexico.

Rio Grande Joint Investigation Report at 7.

The Rio Grande Joint Investigation Report noted that HCCRD is located within the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin, and that "maintenance of an adequate water supply for irrigation" of its lands and "maintaining satisfactory control of salinity" were both major problems to be addressed via the Compact. The latter issue of

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[6] The Rio Grande Joint Investigation Report is part of New Mexico's April 30, 2014 "Proposal to Lodge Non-Record Material Under Rule 32.2, Rules of the Court" as an attachment entitled "Natural Resources Committee, Regional Planning, *Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin In Colorado, New Mexico, and Texas, 1936-1937* (1938)."

salinity, in particular, was "an important consideration" in asserting the section's needs. Rio Grande Joint Investigation Report at 7, 12, 23, and 62.

Negotiations over the Compact, which aimed to equitably apportion the river from its headwaters in Colorado to Fort Quitman, Texas, occurred following, and with the backdrop of, the Warren Act contract between the United States and HCCRD, first entered into in 1924, for the provision of surplus or excess water from the Project to HCCRD.

The Rio Grande Joint Investigation Report shows that the amount of use of water from the Project within HCCRD's jurisdiction was factored into the Joint Committee's calculation of the net diversion and stream-flow depletion between 1930 and 1936 for the Elephant Butte to Fort Quitman section of the river. Id. at 103-104. These diversions formed an essential part of the "necessary allowances for drain flow, wastes, arroyo inflow, and salinity control to derive the required diversion demand on Elephant Butte Reservoir." Id. at 103-104. The need to ensure a high-quality supply of water from project lands in Texas to Fort Quitman – including HCCRD – was precisely the reason Texas insisted upon 800,000 acre-feet from Elephant Butte.[7] HCCRD's interests, and the need for

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[7] The calculated diversion demand amounted to 736,000 acre-feet, but citing the amount of acres actually irrigated, 773,000 acre-feet was recommended as a "conservative estimate." Rio Grande Joint Investigation Report at 104.

salinity control, factored into the Compact negotiations resulting in Texas' final allocation.

C. A legal memorandum from Reclamation's Regional Counsel in 1946 confirms HCCRD's firm rights to water from the Project.

A legal memorandum from Reclamation's Regional Counsel to his Regional Director issued in 1946 confirms Reclamation's recognition of its independent obligation to supply water from the Project to HCCRD, unrelated to EPCWID. Memorandum from Spencer L. Baird, Regional Counsel to Regional Director (Feb. 28, 1946) (Baird Memorandum) (App. 1).

The Baird Memorandum addresses the status of HCCRD's Warrant Act contract and the Project's water supply. The memorandum reviews the contract and finds that it is a "firm" contract for the delivery of water to HCCRD at the terminus of the Tornillo main canal. App. 3, 9. It finds that the United States is obliged to deliver "waste return flow, or flood waters in the Rio Grande" to HCCRD under the terms of the contract. App. 9. It concludes that Reclamation must "make good its obligation to [HCCRD] to supply it with the return flow and operational waste water from the project." App. 9-10.

CONCLUSION

This Court should deny the motion to dismiss filed by New Mexico and proceed to hear the merits of this case.

Respectfully submitted,

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June 2014

SLB/er

COPY MCF

February 28, 1946

REGIONAL COUNSEL'S MEMORANDUM 46-56, REGION 5

To: Regional Director

Subject: Hudspeth Irrigation District – Contract and water supply – Rio Grande Project.

1. Reference is made to paragraph 3 of the Commissioner's letter of February 15. By letter of March 17, 1945, to the Superintendent, there was recommended that action on negotiation of a draft of proposed new permanent contract with the Hudspeth County Conservation and Reclamation District No. 1 should await results of the investigations then pending. The draft of proposed new permanent contract should now be amended in the light of further studies made by the Regional Director to comprehend additional works for the benefit of the district, such as will prevent hostile diversion of waters of the Rio Grande on the Mexican side and also provide a means of use of drain and return flow waters from the project proper in quality such as is hoped will be suitable for irrigation.

2. In my opinion, an amended contract with the district is highly desirable, as preventing a continuation of the procedure followed over a long period of years in the making of annual supplemental contracts having for their sole purpose the determination of charges in a definite amount, due to the United

States from the district each year for the water service rendered under its Warren Act contract of December 1, 1924.

3. The Hudspeth County Conservation and Reclamation District No. 1, hereinafter referred to as the district, comprises some 20,000 acres lying below the lands of the project proper, and which are riparian to the Rio Grande River above Fort Quitman. Before entering into a contract with the United States for a water supply under date of December 1, 1924, this district diverted water for the irrigation of some 10,000 acres under irrigation, directly from the Rio Grande, but due to hostile diversion on the Mexican side, its water supply was not very reliable and it made a determined effort to have its lands made a part of the project as an additional division thereof, and to have such lands served by the same works which served the lands in the so-called Tornillo section of the El Paso County Water Improvement District No. 1. It is understood that because of the fact that there were some excess land ownerships in the district, one of which is understood to have been approximately 1,500 acres, the Bureau declined to consider the proposal, but in lieu thereof, gave favorable consideration to supplying it with water surplus to the project needs, in the character of return flow water from the project operational and drainage wastes, under the provisions of the Warren Act. These demands on the Bureau by the district must have been quite insistent, for there does not appear to be any difference in principle in refusing to furnish the

district with a water supply as a division of the project because there are in the district, lands which due to excess ownership, were not eligible to receive water under the Reclamation Act proper, and furnishing the identical supply to the same lands under the provision of the Warren Act.

4. Be that as it may, the United States did, on December 1, 1924, enter into the Warren Act contract in question on a firm basis, and under which the United States undertook to:

> " * * * deliver to the district at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande Project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal Irrigation Project. In consideration of such rental the District hereby relinquishes all right, title, interest and claim to any and all waters of the Rio Grande, except as herein provided."

5. We think that the contract by its own terms as above quoted, provides that water service shall be upon a firm basis, and the supplemental contracts entered into thereafter from year to year, do not have for their purpose the creation of any

additional obligation on the part of the United States other than that fixed in the contract of December 1, 1924, but merely provide the payment required of the district for years subsequent to 1925, for as you will note, the article following that just above quoted in the contract (being Article 7), provides for payment of a specific amount for water deliveries for the irrigation season of 1925, but for subsequent seasons, the amount to be paid by the district is provided in the contract as follows:

> " * * * for the delivery of water thereafter, (after the irrigation season of 1925) the district shall pay to the United States, on each December 1, such a charge per acre-foot, to be fixed annually by the Secretary of the Interior, as shall return to the United States, six per centum on the construction cost per acre of such project works as affect the district water supply hereunder, plus a proper, proportionate share of the cost of operating and maintaining such project works. The decision of the Secretary of the Interior in fixing such charges shall be final and conclusive."

6. Under this provision it is believed that the Secretary had the power without a supplemental contract to fix the charges due from the district for irrigation seasons subsequent to 1925, and his only obligation therein was that his determination should bear a close relation to the formula outlined in the above quoted portion of Article 7 of the contract, and the only ground for attacking such determination

would be, that it was made arbitrarily and without any relation to any such formula. It is believed that the making of a supplemental contract each year to cover the price for the water service furnished is primarily a matter of convenience to the United States in having of record a consent by the district, to the determination so made, as well as the consent of the two districts comprising the Rio Grande Project which have an interest in the Warren Act contract with the district.

7. As to the water supply to which the district is entitled under the contract of 1924, in my opinion, this is a firm contract and even though it specifically provides that the availability of operational wastes and return flow from the project works shall be in the discretion of the Secretary, such operational waste and return flow could not be reduced by efficient operation, to the point where the district would be deprived of all water. In other words, it is believed necessary to read the contract of December 1, 1924, in the light of the conditions existing on the project at that time, for by such contract the district altered its position and accepted water deliveries from the United States and gave up its interest in the flood waters of the Rio Grande for, and in lieu of the water supply being furnished under the Warren Act contract. At the time this contract was entered into it must have been apparent to the Bureau and to the two districts in the project that there was ample return flow and uncontrollable project waste water available to the district by reason of the method of

operation of the project works, and it must have been in the minds of the parties that such water supply would remain available from year to year and on a firm basis. If such facts were not apparent, it is believed that the Secretary abused his discretion in determining that there was and probably would be sufficient return flow from the project to supply the Warren Act contract over a sufficient period of years to justify the project lands in absorbing their prorata share of any shortage during the comparatively few years when there would not be sufficient water to supply all the project lands and the Warren Act contractor with a full water supply.

8. The matter of determination of whether or not there is water for sale in excess of the project needs under the Warren Act of February 21, 1911, involves an exercise of discretion on the part of the Secretary, for storage "in excess of the requirements on the lands to be irrigated under any project" available for sale under the Warren Act does not in my opinion constitute waters which may be excess and available from year to year, but is intended to mean waters which from reliable water supply studies will be available for firm sale and use under the Warren Act over a period of years. For example, if the water studies on the project show that in 23 out of 25 years there will be water sufficient to supply the requirements of the project lands and in addition enough to supply a Warren Act contractor, it is believed that the Secretary is justified in the exercise of his discretion, in determining that there are excess waters available

for sale under the Warren Act and in the two years when the water supply may fall short of meeting the full requirements of both the project land and the Warren Act lands, he may prorate the available water to meet the requirements of both.

9. On the other hand, if such water supply studies show that there would be waters in excess of the project needs available but 2 out of 25 years, in my opinion, it would be an abuse of discretion under the Warren Act for the Secretary to enter into a Warren Act contract for the sale of such so-called excess waters, for by entering into such a contract under these circumstances he would be leading the Warren Act contractor to believe that a permanent water supply was available for his lands and cause him to make a development on the basis of such a belief.

10. I fully appreciate the fact that the contract of 1924 is specific in its limitations as to the water supply available for the district under the Warren Act. However, I have known of instances where the contracts of the government to supply water were expressly limited to 3 acre-feet per annum, and yet the delivery of larger quantities of water over a long period of years when such water was available in excess of the project needs, induced the courts to ignore the specific contract limitation and to enlarge the same to the extent to which water was actually furnished over such long period of years. The particular instance I have in mind is the experience of the

Bureau on the Sunnyside Division of the Yakima Project.

11. It is understood that the condition at the headworks for the district have been changed since the execution of this contract:

(a) By the International Boundary Commission (American section) River Rectification Project, and

(b) By demands of the Tornillo Division of the project.

The rectification project is understood to have changed the course of the river and to make the flood, waste and surplus waters in the river more vulnerable to hostile diversion in Mexico than they were before the river was straightened. These works are understood to have placed drain and return flow water from the project beyond the control of the Bureau and into the rectified channel of the Rio Grande, where diversions thereof are being made on the Mexican side. It is also understood that in the past several years there have been objections by lands in the Tornillo section of the project to the use of large quantities of drain waters because of their mineral content, and that such lands have demanded a mixing of a larger proportion of project storage water with the drain waters because the owners of such lands maintained that they were entitled to the same quality of water as that furnished any other project lands. It is believed that such demands are not justified in that the United States is entitled to

make available to lands in the lower end of any project, such of the return flow as may come from irrigation of lands in the higher section, so long as the quality of water delivered to the lower lands is not seriously objectionable for irrigation purposes. Nor is it believed necessary for the United States to supply the lands in the Tornillo division of the project with any better quality of water than that which it undertakes to supply its Warren Act contractor.

12. In the past several years it is also understood that the district has reestablished its Alamo diversion works in the Rio Grande and has been diverting large quantities of water available in the river which together with the water in its heading from the Tornillo canal has aggregated approximately 6.01 acre feet [sic] per acre.

13. In my opinion, it makes no difference where the waste return flow, or flood waters in the Rio Grande may be delivered to the district except, of course, that sufficient must be delivered through headworks out of the Tornillo canal, to supply the district lands above the lower heading of the district in the river.

14. The two districts comprising the project may not override the exercise of discretion in the Secretary, to determine whether or not at the lower end of the project proper there is sufficient water to supply a Warren Act contractor on a firm basis, however, since the districts are obligated to pay the construction obligation of the project it has been the

practice to require the two districts to consent not only to the basic contact with the Hudspeth District, but also to the so-called supplemental contracts executed from year to year. However, the interest of the Bureau in dispensing of water, excess to the project needs in the way of return flow and drainage water, is identical with the interest of the project districts, for any credits accruing to the United States under the Warren Act contract are applied on the contract obligation of the two project districts to the United States for construction charges.

15. If, as I am informed, the construction of the river rectification project by the International Boundary Commission has made water surplus to the project needs in the river formerly available for the Hudspeth District vulnerable to hostile diversion on the Mexican side, it would seem to me that such agency would have the responsibility of restoring conditions in the rectified channel as they theretofore existed with respect to the ability of the United States to make good its obligation to the district to supply it with return flow and operational waste water from the project.

16. In summary it is my opinion:

(a) That the United States should enter into a contract amendatory of the contract of December 1, 1924, to supply the district with excess water as defined in the basic contract.

(b) That such contract should provide for the construction of works either by the

Bureau or by the International Boundary Commission (American section) necessary to provide the district with water available to it before the River Rectification Project of the International Boundary Commission was constructed, and for the conservation of project return flow and drainage water, the quality of which may be suitable for irrigation of the lands in the Tornillo Section of the project proper, and the district lands by adulteration with project storage.

(c) That such contract provide for delivery to a point or points agreeable to the United States and the district at a fixed charge such as will return the cost of the additional construction, and provide a credit to the project construction charges, and an actual operation and maintenance charges based upon an equitable allocation of costs of operation and maintenance of structures essential to the delivery of water to the district under the terms of such contract.

- - -

Spencer L. Baird

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN 16 2014
OFFICE OF THE CLERK

No. 22O141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion to Dismiss

TEXAS' BRIEF IN RESPONSE TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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June 2014

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INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Texas' Complaint seeks the Court's interpretation and enforcement of the 1938 Rio Grande Compact (Rio Grande Compact or Compact). New Mexico is violating the Rio Grande Compact by authorizing and permitting the interception, depletion and diversion of, and interference with, waters of the Rio Grande including Rio Grande Reclamation Project (Rio Grande Project) return flows, that were equitably apportioned to Texas by the Compact

New Mexico's Motion to Dismiss asserts that Texas' Complaint does not state a claim for relief because Texas has failed to identify any express term of the Compact requiring New Mexico to ensure that water apportioned to Texas pursuant to the Compact reaches the Texas state line, and that New Mexico's sole responsibility under the Compact is to deliver water into Elephant Butte Reservoir. New Mexico further contends that Texas' apportionment of Rio Grande water is solely governed by and dependent upon New Mexico state water law, and that the only way Texas can vindicate its Compact rights is pursuant to a New Mexico state court adjudication and a "priority call" to the New Mexico State Engineer. New Mexico's assertions lack merit, and its Motion to Dismiss should be denied for at least four reasons.

First, New Mexico has failed to meet the burden for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (hereinafter referred to as Rule 12(b)(6)). A motion to dismiss assumes that all of Texas' factual allegations are true, and it is not a vehicle for resolving factual disputes. New Mexico's Motion to Dismiss, however, is almost entirely devoted to arguing disputed factual issues.

Second, New Mexico mischaracterizes the Texas Complaint. Texas does not allege that New Mexico must ensure deliveries of Texas' apportioned Rio Grande water to the Texas state line. Texas alleges that New Mexico has breached its delivery obligation under Article IV of the Compact by authorizing and permitting New Mexico users to divert, deplete and otherwise interfere with water apportioned to Texas under the Compact. Texas' Complaint (Compl.) at ¶¶ 18-20, 24-25. New Mexico never addresses Texas' actual allegations, but instead focuses its Motion to Dismiss on issues not alleged in Texas' Complaint.

Third, New Mexico uses its Motion to Dismiss as a vehicle to reargue its opposition to allowing Texas to file its Complaint, alleging that alternative forums are available for Texas to address its dispute with New Mexico. These arguments have already been rejected by the Court. Moreover, these arguments are not relevant to deciding the discrete legal issue properly raised in a Rule 12(b)(6) motion to dismiss.

Finally, assuming *arguendo* that New Mexico's Motion to Dismiss is not otherwise defective, New Mexico's arguments would lead to an implausible, impractical and anomalous result. According to New Mexico, it could authorize and permit, pursuant to New Mexico state law, the interception and depletion of *all* of the waters of the Rio Grande below Elephant Butte Reservoir for use within New Mexico, thereby preventing any of the water equitably apportioned to Texas from ever reaching irrigable lands in Texas.[1] It is simply implausible that Texas would bargain for such a deprivation of its equitable apportionment under the Compact.

STATEMENT

Texas has previously provided a detailed description and history of the Rio Grande Basin, the Rio Grande Project, the Rio Grande Compact, and Post-Compact events in the Rio Grande Basin in Southern New Mexico. *See* Compl. at ¶¶ 2-16, and Brief in Support of Motion For Leave to File Bill of Complaint (Texas Mot. For Leave) at 5-18. In the United States' Amicus Curiae Brief (U.S. Amicus

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[1] In addition, none of the water allocated to Mexico pursuant to the Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455 (Mexico Treaty) would be available to Mexico.

Br.) at 3-8, the United States also provided detail on the history of the Rio Grande Project and the Compact. Below is an abbreviated description of the Rio Grande Compact and Rio Grande Project relevant to New Mexico's Motion to Dismiss.

I. The Rio Grande Project

Shortly after enactment of the Reclamation Act of 1902, Congress authorized the construction of a dam near Engle, in the territory of New Mexico, to irrigate lands in New Mexico and Texas, subject to cost and other feasibility considerations. Act of February 25, 1905, Pub. L. No. 58-104, ch. 798, 33 Stat. 814. Pursuant to this authority, the Secretary of Interior approved the construction of Elephant Butte Dam in 1910. Construction of the dam was completed in 1916, creating a reservoir with 2,639,000 acre feet of capacity. *Part VI-The Rio Grand Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 73 (1938) (Joint Investigation).[2]

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[2] Texas (as well as New Mexico) cites to the Joint Investigation for background information and other facts not in dispute. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated by reference, and matters of which a court may take judicial notice"). In a letter to the Clerk of the Court dated April 30, 2014, New Mexico offered to lodge with the Court the Joint Investigation pursuant to Supreme Court Rule 32.3.

Footnote continued on following page.

By 1938, when the Joint Investigation was completed, Rio Grande Project water stored and released from Elephant Butte Reservoir was distributed through more than 630 miles of main canals and laterals, which were taken over by the Rio Grande Project and reconstructed, enlarged, extended, and incorporated into the Rio Grande Project distribution system. Joint Investigation at 83. There were also six diversion dams and permanent diversion works constructed by this time:

> Percha Dam at the head of Rincon Valley, diverting to the Arrey canal; Leasburg Dam at the head of Mesilla Valley, diverting to the Leasburg canal; Mesilla Dam southwest of Las Cruces, diverting to the east side and west side canals; the International Diversion Dam opposite El Paso, diverting to the Mexican Acequia Madres on the west side and to the Franklin canal on the east side; Riverside Heading about 15 miles below El Paso, diverting to the Riverside canal and Franklin feeder; and Tornillo Heading near the town of Fabens, diverting to the Tornillo canal.

Subject to the Court's determination regarding the role of extrinsic evidence on a Rule 12(b)(6) motion to dismiss, Texas does not oppose the lodging of the Joint Investigation.

Joint Investigation at 83-84. The drainage system for the Rio Grande Project was substantially complete and comprised more than 450 miles of deep open drains. Joint Investigation at 84. The Hudspeth County Conservation and Reclamation District, below and southeast of the Rio Grande Project, also had an irrigation and drainage system, diverting drainage and return water from the terminus of the Tornillo canal under its Warren Act contract. Joint Investigation at 85-86.

To allow for power generation at Elephant Butte Dam and additional flood control and river regulation, Caballo Dam and Reservoir was sited about 25 miles below Elephant Butte Dam. Joint Investigation at 84-85. At the time, it was anticipated that Caballo Dam would provide a reservoir of about 350,000 acre feet capacity. Joint Investigation at 85. In 1936, Congress had also appropriated funds for and authorized "works for the canalization of the Rio Grande from the Caballo Reservoir site in New Mexico to the international dam near El Paso, Texas." Act of June 4, 1936, Pub. L. No. 74-648, ch. 500, 49 Stat. 1463.

II. The Rio Grande Compact

The Compact's preamble provides that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States . . . with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas" and "*for the purpose of effecting an*

equitable apportionment of such waters." Compact, 53 Stat. 785 (1939) (emphasis added); Appendix to Complaint (App. to Compl.) at App. 1.

The Compact's terms cannot be understood without an understanding of the Rio Grande Project. The Rio Grande Project is referred to directly in Article I(k) of the Compact in the definition of Project Storage and indirectly over 50 times in the Compact by the use of that definition in other defined terms.[3] Article I(l) then defines Usable Water as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." Project Storage and Usable Water are used throughout the Compact, and are also incorporated into other defined terms used in the Compact, including Credit Water, Actual Release, and Actual Spill. App. to Compl. at App. 3. All of these terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact, because these terms have no meaning absent the existence of the Rio Grande Project, and its operation by the United States. The interrelationships between the Compact and the Rio

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[3] Project Storage is defined in Article I(k) of the Compact as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte Reservoir and above the first diversion point to lands of the *Rio Grande Project*, but not more than a total of 2,638,860 acre-feet." App. to Compl. at App. 3 (emphasis added).

Grande Project are a critical aspect of how the Compact is implemented. The delivery of Texas' apportioned water under the Compact cannot occur without the Rio Grande Project.

Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations. App. to Compl. at App. 5-8.

Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. App. to Compl. at App. 9-11.[4] These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for Rio Grande Project operations absent upstream development

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[4] In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries to Elephant Butte Reservoir. Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico (Feb. 24, 1948).

that took place after 1929 (the date of the Temporary Compact) and 1937 (the date that the 1938 Compact negotiations concluded). Water is delivered to Elephant Butte Reservoir because it was the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of Usable Water stored in Rio Grande Project facilities. This is subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre feet per annum, or where there are relinquishments of Accrued Credits available. App. to Compl. at App. 14. Credits are prescribed in Article VI of the Rio Grande Compact. *Id.* at 11-14. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of Accrued Debits sufficient to bring the quantity of Usable Water in Rio Grande Project Storage to 600,000 acre feet. *Id.* at 14-15.

The waters equitably apportioned under the Compact are those waters of the Rio Grande Basin

as defined in Article I(c) of the Compact.[5] Water apportioned to Colorado under the Compact is the water in the Basin above the New Mexico border in excess of its delivery obligation at Lobatos. Depletions in Colorado that reduce these deliveries create debits that must be replenished by Colorado through (1) release of water stored in Colorado, (2) reduced diversions and use in Colorado, (3) importation of water from outside the Rio Grande Basin, or (4) the release, in wet years, of water that is in excess of normal delivery requirements.

The water apportioned to New Mexico by the Compact is the water in the Basin *above* Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. Depletion in New Mexico above Elephant Butte that reduces these deliveries creates debits that must be replenished by New Mexico through (1) release of water stored upstream in New Mexico, (2) reduced diversions and use in New Mexico, (3) importation from outside of the Rio Grande Basin, or (4) the release, in wet years, of water that is in excess of normal delivery requirements. No water below Elephant Butte is apportioned to New Mexico.[6]

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[5] Article I(c) defines Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado." App. to Compl at App. 2.

[6] Rio Grande Project water is, of course, delivered from the Rio Grande Project to lands within New Mexico, pursuant to Elephant Butte Irrigation District's contract with the United

Footnote continued on following page.

The water apportioned to Texas under the Compact is the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project. Under Articles I(k), (l) and (o) and Article IV of the Compact, the water in Elephant Butte is Usable Water in Project Storage of the Rio Grande Project. App. to Compl. at Apps. 3 and 9-11. This plain language assumes that water equitably apportioned to Texas will actually reach Texas' irrigable lands unencumbered by the actions of New Mexico. Nothing in the Compact allows New Mexico to deliver water into Elephant Butte and then take it back once that water is released from Elephant Butte.[7]

States. Joint Investigation at 73-74; *see also* App. to U.S. Amicus Br. at 1a-4a. In order to ensure that Texas receives water apportioned to it under the Compact, which includes return flows from Rio Grande Project lands in New Mexico, the Rio Grande Project needs to be operated as a single unit. *See infra* pp. 54-55, discussion of statement by Berkeley Johnson, U.S. Representative to the Rio Grande Compact Commission, *Function, Organization, and Procedure of the Rio Grande Compact Commission in Proceedings – First Meeting of the Upper Rio Grande Drainage Basin Committee of the National Resources Planning Board* (Jan. 27, 1940) (Berkeley Johnson Statement), reprinted in the Appendix to this Brief at App. 1-5.

[7] The ability of Rio Grande Project lands within New Mexico to benefit from storage in Elephant Butte is based solely on federal contracts issued under the authority of the Rio Grande Project. *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977).

New Mexico's obligation to deliver water into Elephant Butte Reservoir, which would provide for a normal release of 790,000 acre feet from Elephant Butte, is predicated on this quantity of water being used and reused within the Rio Grande Project, so that approximately 950,000 acre feet (including Rio Grande Project return flows) would be available to divert for the irrigation of all Rio Grande Project lands. *See* Joint Investigation at 88, Table 72 (setting forth gross diversions by canal systems in the Rio Grande Basin in 1936, and specifically the Rio Grande Project); *Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27 to October 1, 1937* at 9 (1937 Commission Proceedings) (explanation by Mr. Harlowe Stafford, engineer in charge of the Joint Investigation, that the diversion demand for the Elephant Butte-Fort Quitman section is 953,000 acre feet).[8] If Rio Grande Project releases and return flows are intercepted for use in New Mexico, then 950,000 acre feet is no longer available to divert for use on Rio Grande Project lands in New Mexico and Texas, and, as a consequence, Texas will not receive the water that it was apportioned by the Compact.

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[8] In its April 30, 2014 letter to the Clerk of the Court, New Mexico also offered to lodge the 1937 and 1938 Commission Proceedings with the Court. Subject to the Court's determination regarding the role of extrinsic evidence on a Rule 12(b)(6) motion to dismiss, Texas does not oppose the lodging of the 1937 and 1938 Commission Proceedings.

III. Texas' Bill of Complaint and New Mexico's Motion to Dismiss

Texas submitted its Motion for Leave to file a Bill of Complaint against New Mexico and Colorado in January 2013.[9] This Court granted Texas' Motion for Leave to File Complaint on January 27, 2014, and granted New Mexico leave to file a motion in the nature of a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure Rule 12(b)(6). *Texas v. New Mexico & Colorado*, 134 S. Ct. 1050 (2014). The United States filed a Motion for Leave to Intervene on February 27, 2014. This Court granted the United States' Motion for Leave to Intervene on March 31, 2014. New Mexico filed its Motion to Dismiss (N.M. Br.) on April 30, 2014. New Mexico appended numerous excerpts from pre-Compact correspondence and reports to its Motion to Dismiss, or otherwise offered documents for lodging with the Court.

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[9] Texas named Colorado because it is a party to the Compact, but sought no relief against that State. Compl. at ¶ 5. Colorado filed an opposition to the motion for leave in March 2013 but did not file a motion to dismiss.

ARGUMENT

I. New Mexico's Motion to Dismiss Should Be Denied Because It Does Not Meet Threshold Federal Rule of Civil Procedure 12(b)(6) Standards

A. Standard for Motion to Dismiss

Rule 12(b)(6) provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This Court's Rule 12(b)(6) jurisprudence serves as a guide in this case. *See* Sup. Ct R. 17.2.

Rule 12(b)(6) allows for streamlining a case, and "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). In evaluating a Rule 12(b)(6) motion to dismiss, a court assumes that the factual allegations in the Complaint are true, and draws inferences from those allegations in the light most favorable to plaintiff. A court also construes the complaint liberally. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2006); *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). The Complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (holding that

the court must construe the complaint in favor of the plaintiff).

This Court has ruled on dispositive motions in original jurisdiction actions only in rare circumstances where the facts are not in dispute. *United States v. Alaska*, 501 U.S. 1248 (1991) (permitting the briefing of a legal issue in an original action based on stipulated facts). Moreover, this Court has taken a cautious approach toward critical public issues where the facts are not clear. The Court has stated, "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated legislation, contracting and practice." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948).

This Court liberally allows full development of facts in original actions. *United States v. Texas*, 339 U.S. 707, 715 (1950) (". . . in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, [this Court] has always been liberal in allowing full development of the facts."); *Kansas v. Colorado*, 185 U.S. 125, 145 (1902) (holding that because of the "intricate questions arising on the record [of the original case, the Court is] constrained to forbear proceeding until all the facts are before us on the evidence."); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction in the determination of the boundary line between

sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."); *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995) (affording "fair opportunity" for a State to present its case).

B. Standard for Interstate Compact Interpretation

As it does with contracts, this Court interprets interstate compacts "according to the intent of the parties." *Montana v. Wyoming*, __ U.S. __, 131 S. Ct. 1765, 1771 n.4 (2011). The Court begins "by examining the express terms of the Compact as the best indication of the intent of the parties." *Tarrant Reg'l Water Dist. v. Herrmann*, __ U.S. __, 133 S. Ct. 2120, 2130 (2013). A plain reading of the Compact should "make[ ] sense in light of the circumstances existing in the signatory States when the Compact was drafted." *Montana*, 131 S. Ct. at 1778 (noting that the Yellowstone River Compact "would have been written to protect the irrigation uses that were legislatively favored . . . .").

The terms of the Compact should not be interpreted to produce "anomalous results," *Tarrant*, 133 S. Ct at 2131, or "an extremely implausible reading," *Oklahoma v. New Mexico*, 501 U.S. 221, 232 (1991). An interpretation of a compact term that produces impractical results suggests that the term is ambiguous, *id.* at 232-33, and an ambiguous term should be harmonized with the intent of the drafters,

id. at 237. When a compact term is ambiguous, it is appropriate to "turn to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant*, 133 S. Ct. at 2132; *Oklahoma*, 501 U.S. at 234-35 & n.5 ("a congressionally approved compact is both a contract and a statute . . . and we have repeatedly looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous").

In its Motion to Dismiss, New Mexico suggests that when an interstate water compact is silent on a matter, the Court automatically invokes the presumption that States intend to retain sovereignty over waters in their jurisdiction. N.M. Br. at 23-24 (citing *Tarrant*, 133 S. Ct. at 2132). This is incorrect. Rather, when a compact's silence causes ambiguity about rights under the Compact, the Court "turn[s] to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant*, 133 S. Ct. at 2132.[10]

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[10] For example in *Tarrant*, the Court considered two additional interpretive tools to "shed light" on the Red River Compact's silence regarding state borders in section 5.05(b)(1) of that compact. First, the Court looked to other interstate water compacts that have addressed cross-border rights. Second, the Court considered the parties' course of dealing. *Id.* These issues require the development and consideration of detailed factual information that cannot be resolved within the scope of a Rule 12(b)(6) motion.

Moreover, a compact's silence on a matter is not synonymous with ambiguity; the drafters may simply have intended for commonly understood facts and settled law to apply. In *New Jersey v. New York*, 523 U.S. 767 (1998), the Court interpreted an 1834 compact (which set the boundaries between New Jersey and New York) to determine which state has jurisdiction over the filled land on Ellis Island. As part of its analysis, the Court considered the conclusions that could reasonably be drawn from the compact's silence on landfilling, and explained that "[t]here would have been no reason to [address the consequences of landfilling], simply for the reason that the legal consequences were sufficiently clear under the common law as it was understood in 1834." *Id.* at 783. The common law governing avulsion "speaks in the silence of the Compact, and we follow it to conclude that the lands surrounding the original Island remained the sovereign property of New Jersey when the United States added landfill to them." *Id.* at 784. On this point, the majority cautioned against converting silence on an issue into a contractual ambiguity. "[N]o such translation is possible here, for the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify." *Id.* at 783 n.6.[11]

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[11] *See also Tarrant*, 133 S. Ct. at 2133 ("We think that the better understanding of [the Red River Compact section] 5.05(b)(1)'s silence is that the parties drafted the Compact with this legal background in mind . . . .").

In any event, the presumption discussed in *Tarrant*—that States do not easily cede regulatory authority to control their waters— is inapplicable, in this case, because New Mexico admits that the Compact requires it to cede control of the water delivered to Elephant Butte Reservoir. New Mexico admits that it must "relinquish[ ] control over the water by delivering it into Elephant Butte Reservoir." N.M. Br. at 37-38; *see also* N.M. Br. at 39-40 (acknowledging New Mexico's "duty to deliver Rio Grande Compact water to the possession and control of Reclamation").

The Compact requires New Mexico to deliver water into Elephant Butte Reservoir and to thereby relinquish control of the water for storage and distribution by the Rio Grande Project. New Mexico's jurisdiction over the waters in the Lower Rio Grande is limited by both the express requirements of the Compact and the operation of the Rio Grande Project. New Mexico has ceded regulatory authority over this portion of the Rio Grande. The Commissioner negotiating the Compact for New Mexico recognized this cession of control when he stated: "[f]or purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." City of Las Cruces Amicus Curiae Brief in Support of State of New Mexico's Motion to Dismiss Texas'

Complaint and the United States' Complaint in Intervention (Las Cruces Amicus Br.) at 16.[12]

C. New Mexico Has Not Met Its Burden Under Federal Rule of Civil Procedure 12(b)(6)

New Mexico has not met the burden imposed by Rule 12(b)(6) and its Motion to Dismiss should be denied because: (1) Texas states a claim for relief under the Rio Grande Compact; (2) New Mexico's characterization of Texas' Complaint is mistaken;

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[12] The Las Cruces Amicus Brief generally tracks the points made by New Mexico in its Motion to Dismiss. As such, Texas' response to New Mexico's Motion to Dismiss applies equally to the points made by Las Cruces. Las Cruces also complains, however, that the Compact fails to consider equities of water users in New Mexico below Elephant Butte Reservoir (Las Cruces Amicus Br. at 16) and it would have been "absurd" for New Mexico to enter a compact "which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project . . . ." Las Cruces Amicus Br. at 16-17. In making this argument, Las Cruces ignores that in the negotiations leading to the Compact, New Mexico users below the Dam were aligned with Texas. *See City of El Paso ex. rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 385 (D. N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D. N.M. 1984). Moreover, Las Cruces ignores the fact that New Mexico traded off additional benefits to lands below Elephant Butte in New Mexico in return for the substantial benefits it obtained for lands in the Middle Rio Grande in New Mexico. Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163, 172-73 (1974); *see supra* section II.C. at pp. 50-51.

and (3) New Mexico relies on documents and facts beyond the scope of a Rule 12(b)(6) motion.

1. Texas States a Claim for Relief Under the Rio Grande Compact

To succeed on its Motion, New Mexico must establish "beyond doubt that [Texas] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. at 45-46. Here, the factual allegations in Texas' Complaint are assumed as true for purposes of New Mexico's Rule 12(b)(6) motion. *See, e.g.*, Compl. at ¶¶ 8, 10, 11, 13, 18, 19, 24 and 25. For the purposes of New Mexico's Motion, the Court assumes that New Mexico has caused injury to Texas by intercepting, depleting and interfering with Texas' apportionment of the waters of the Rio Grande under the Compact in the manner specified in the above referenced Complaint paragraphs. *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556 For the purposes of this Motion to Dismiss, therefore, the Court assumes that New Mexico's actions injure Texas. The legal question posed by the Motion to Dismiss is whether these actions violate the Rio Grande Compact.

2. New Mexico Misstates Texas' Allegations

New Mexico has mischaracterized the allegations made in the Texas Complaint. New Mexico claims that the Texas Complaint asserts that

the Compact imposes a delivery obligation at the New Mexico-Texas state line, and that the Compact imposes a duty on New Mexico to protect Rio Grande Project deliveries to the state line. N.M. Br. at 20, 28-30.

Texas, however, does not allege that the Compact includes a state line delivery obligation. Compl. at ¶ 10. Rather, Texas asserts that the Compact requires New Mexico to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to intercept, deplete or otherwise interfere with water released by the Rio Grande Project for the benefit of Rio Grande Project lands in Texas. Compl. at ¶¶ 10-11, 13, 18-19. New Mexico violates the Compact, including its delivery obligation in Article IV, when it allows water users to intercept, deplete or otherwise divert flows of the Rio Grande below Elephant Butte, which adversely affects Rio Grande Project operations including the amount of water that flows to irrigable lands in Texas. Compl. at ¶¶ 18-19. The Compact's express terms support this interpretation of New Mexico's delivery obligation.

New Mexico also argues that the Compact does not impose an obligation on New Mexico to "protect Rio Grande Project deliveries to the stateline." N.M. Br. at 20. However, Texas has never alleged that New Mexico has an obligation to "protect" Rio Grande Project or other flows to the

state line. Texas alleges that New Mexico violates the Compact when it permits and allows actions that interfere with Rio Grande Project deliveries to Texas of waters apportioned to Texas in the Compact. Texas alleges that New Mexico has done this by authorizing and permitting for use in New Mexico, the diversion of Rio Grande water, including return flows from Rio Grande Project lands in New Mexico, all of which have been apportioned to Texas. Compl. at ¶ 18.

New Mexico's Motion to Dismiss must be denied because it is based upon claims that have not been made by Texas, and which have nothing to do with the actual Complaint allegations made by Texas.[13]

3. New Mexico Relies on Documents and Facts Beyond the Scope of a Rule 12(b)(6) Motion

Rather than presenting a discrete legal issue as required by Rule 12(b)(6), New Mexico cites to 44 pages appended to its Motion to Dismiss, offers to

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[13] At various places New Mexico alleges that the "principal allegation" of Texas' Complaint is that New Mexico has breached an implied obligation of good faith and fair dealings. *See, e.g.*, N.M. Br. at 24-28. While Texas has alleged that New Mexico has acted in bad faith, the gravamen of its claim is that New Mexico's actions have breached the purpose and intent of the Compact. *See* Compl. at ¶¶ 18-20, 22, 25-28.

lodge 898 pages of additional mixed factual and legal materials[14] and relies on factual assertions in a cited law review article. New Mexico also relies on correspondence and unsubstantiated claims concerning the alleged intent of the Rio Grande Compact negotiators, and selectively provides and cites to a small sampling of documents that purportedly supports its novel Rio Grande Compact interpretation. *See, e.g.*, N.M. Br. at 13-14, 35-36 (providing New Mexico's interpretation of the implications of a 1938 letter drafted by Texas' Compact Commissioner). These documents do not represent the full universe of historical materials relating to the Compact and its negotiations.[15]

The Court should not consider extrinsic materials in its review of a Rule 12(b)(6) motion, and should accept as true all material factual allegations within the Complaint. *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 556; *Arpin v. Santa Clara*

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[14] Pursuant to the instructions of the Clerk of the Court, Texas has also submitted a letter dated June 13, 2014, to the Clerk objecting to the lodging of one of the documents offered by New Mexico, based on both procedural and evidentiary grounds.

[15] A final determination of the issues in this case will undoubtedly involve an evaluation of numerous historic documents, but the review of these materials at this stage of the litigation is inappropriate. A Rule 12(b)(6) motion is based upon factual allegations in the complaint, not on extrinsic evidence. *Conley v. Gibson*, 355 U.S. at 45-46; *Arpin*, 261 F.3d at 925.

Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001). In its original jurisdiction, the Supreme Court retains "ultimate responsibility" for both findings of fact and conclusions of law. *See United States v. Maine*, 475 U.S. 89, 98 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). New Mexico's reliance on these extrinsic documents, and on factual allegations outside the pleadings, requires that its Motion to Dismiss be denied as improperly outside the scope of a Rule 12(b)(6) motion.

II. The Compact Prohibits New Mexico and Its Citizens from Intercepting, Depleting or Interfering with Waters Equitably Apportioned to Texas

A. The Express Terms of the Compact Support Texas' Interpretation of New Mexico's Delivery Obligation

1. The Compact Apportions Waters of the Rio Grande Basin Above Fort Quitman, Texas

The Rio Grande Compact apportions waters of the Rio Grande above Fort Quitman, Texas. The preamble of the Compact states the intent of Compact drafters to "remove all causes of present and future controversy among the States . . . to the use of the waters of the Rio Grande above Fort Quitman, Texas," and to "effect[ ] an equitable apportionment of such waters." App. to Compl.

at App. 1. The definition of "Rio Grande Basin" means "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman . . . ." *Id.* at 2. These preliminary assertions of the signatory States' purpose and intent provide the relevant context for interpreting the remaining Compact terms. *See Alabama v. North Carolina*, 560 U.S. 330, 359 (2010) (Kennedy, J., concurring) (explaining that compacts, like treaties, "are to be interpreted upon the principles which govern the interpretation of contracts . . . with a view to making effective the purposes of the high contracting parties" (quoting *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921))); *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

2. The Compact Requires New Mexico to Cede Control of Rio Grande Water at Elephant Butte Reservoir

New Mexico has permitted and allowed individuals and entities in New Mexico below Elephant Butte Reservoir to divert the waters of the Rio Grande, including return flows from Rio Grande Project lands in New Mexico, for use within New Mexico. Compl. at ¶¶ 18-19. New Mexico maintains that these actions do not violate the Compact because the Compact does not impose a state line delivery obligation and does not impose a duty to ensure flows below Elephant Butte Reservoir to

Texas. N.M. Br. at 20-21. This position ignores the plain meaning of the word "deliver."

A congressionally approved compact is both a contract and a statute. *Virginia v. Maryland*, 540 U.S. 56, 66 (2003); *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. Compacts, like all statutes, must be read to give effect to every word. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (describing the cardinal rule of statutory interpretation). In this case, the Court must interpret the Compact to give effect to the critical term "deliver" as it is used in Article IV, and avoid an interpretation that renders the term void or insignificant. *See id.*

"Delivery" means "[t]he formal act of transferring something" or "the giving or yielding possession or control of something to another." *Black's Law Dictionary* 494 (9th ed. 2009); *see also Black's Law Dictionary* 349 (2d ed. 1910) (defining "delivering" in the context of "conveyancing" as "[t]he final and absolution transfer of a deed . . . in such manner that it cannot be recalled by the grantor"). Article IV of the Compact requires New Mexico to "deliver" water into Elephant Butte Reservoir, which means transfer control of Rio Grande water for storage and distribution by the Rio Grande Project. When New Mexico authorizes and permits water users below Elephant Butte to divert and intercept the waters of the Rio Grande, including return flows from Rio Grande Project lands in New Mexico, for use in New Mexico, it is asserting, not relinquishing,

control over that water contrary to the law of equitable apportionments. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*) (state law rights pre-existing a compact were held to be subordinate to an equitable apportionment under the compact), and discussion *infra* at 59-60. Moreover, an obligation to "deliver" water would be meaningless if New Mexico could simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas. Such an interpretation cannot be correct. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983) ("It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will.").

The Compact recognizes that water delivered into Elephant Butte Reservoir becomes subject to the control and distribution by the Rio Grande Project as Usable Water in Project Storage. *See supra* discussion at p. 7 and note 3. Indeed, the Compact utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it. Usable Water is available for release to meet irrigation demands on Rio Grande Project lands in New Mexico and in Texas, as well as for delivery to Mexico to satisfy treaty obligations. App. to Compl. at App. 3. It is not available for use and appropriation in New Mexico pursuant to New Mexico state law.

New Mexico misses the point when it argues that "Texas has failed to identify any term of the Compact . . . requiring New Mexico to control diversions of either Rio Grande Project or non-Rio Grande Project water after it has relinquished control over the water by delivering it into Elephant Butte Reservoir." N.M. Br. at 37-38. Texas alleges in its Complaint that New Mexico has breached its delivery obligation of Article IV of the Compact because it has *not* "relinquished" control over the water purportedly "delivered" by it into Elephant Butte Reservoir, by authorizing and permitting the diversion of Rio Grande water, including Rio Grande Project return flows, for use in New Mexico. Compl. at ¶¶ 18-19. These Texas allegations are taken as true for purposes of the Motion to Dismiss.

In fact, New Mexico admits that it has not relinquished control of water equitably apportioned to Texas under the Compact. New Mexico explains, in great detail, the steps it has taken to assert control over Rio Grande Project water below Elephant Butte Reservoir and above the Texas state line. In the ongoing adjudication of the Lower Rio Grande in New Mexico state court, the adjudication court has made various rulings regarding Rio Grande Project water, including erroneous determinations of when Rio Grande Project water "loses its identity as surface water" and becomes "subject to appropriation in accordance with applicable [New Mexico] statutes." N.M. Br. at 55 (internal citations and quotations omitted). Asserting jurisdiction in a state adjudication

proceeding over Rio Grande Project water governed by the Compact, in the manner that New Mexico describes in its Motion to Dismiss, is the diametric opposite of "relinquish[ing] control over the water by delivering it into Elephant Butte Reservoir." This, in itself, violates New Mexico's delivery obligation under Article IV of the Compact.

3. New Mexico's Interpretation of "Deliver" Ignores the Other Provisions of the Compact

New Mexico's interpretation of its Compact delivery obligation also renders the Compact's scheduled delivery amounts completely arbitrary. This impractical result is another reason to reject New Mexico's argument. The Compact drafters in 1938 negotiated a delivery schedule that is fixed; the flow of water measured at the upper index station at Otowi Bridge determines the required delivery amount at the lower index station at Elephant Butte Reservoir. Depletions by water users between Otowi and the Elephant Butte Reservoir (such as by the Middle Rio Grande Conservancy District) cannot be increased beyond the 1938 conditions unless accounted for by debits and credits under the Compact. If New Mexico users below Elephant Butte Reservoir are permitted to deplete the waters released from the Reservoir, the carefully crafted Article IV fixed delivery schedule would make no sense. The debit/credit provisions of the Compact were intended to protect Texas from depletions in Colorado and New Mexico. If it were intended that

depletions in New Mexico below Elephant Butte are permitted, then the Compact would have been structured to include a debit/credit provision similar to Article VI of the Compact to address depletions in New Mexico below Elephant Butte.

Further, New Mexico's interpretation of Article IV's delivery obligation cannot be reconciled with the basic accounting structure of the Compact. New Mexico must deliver water into Elephant Butte Reservoir in quantities determined by the schedule provided in Article IV. Once delivered into Elephant Butte Reservoir, Rio Grande water becomes Usable Water in Project Storage. These terms are relevant to provisions of the Compact that limit storage and account for shortages in deliveries. For example, Article VII limits storage in New Mexico and Colorado based on the levels of Project Storage. Whenever there is less than 400,000 acre feet of Usable Water in Project Storage, then New Mexico (and Colorado) shall not increase the amount of water in storage in reservoirs constructed after 1929, i.e., reservoirs above Elephant Butte Reservoir. App. to Compl. at App. 14. This limitation is adjusted when actual releases of Usable Water exceed 790,000 acre feet per annum. *Id.*[16]

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[16] Allowing these depletions by New Mexico water users below Elephant Butte not only deprives Texas of water apportioned to it by the Compact, but also adversely affects water users in the Middle Rio Grande in New Mexico and in Colorado by requiring more water to be bypassed upstream of Elephant Butte to

Footnote continued on following page.

The Compact also uses a system of debits and credits to account for delivery obligations. If the actual delivery of water is less than the scheduled delivery, then there is an Annual Debit for the year. App. to Compl. at App. 2. Similarly, an Annual Credit equals the amount by which an actual delivery in a calendar year exceeds the scheduled delivery. *Id.* Over time, the sum of the Annual Debits and Annual Credits become Accrued Debits or Accrued Credits. *Id.*

Under Article VI of the Compact, the Accrued Debit of New Mexico may not exceed 200,000 acre feet (with one exception). If it does, then New Mexico must retain water in post-1929 storage reservoirs at all times to the extent of its Accrued Debit. Under Article VII of the Compact, the Commissioner for Texas may then demand that New Mexico release this water. App. to Compl. at App. 14-15. If these releases were not intended to benefit Texas, then there would be no reason to give Texas the sole ability to demand these releases.

New Mexico's reading of the Compact completely contravenes the logic of the Accrued Debit provision. Texas' right to demand the release of Accrued Debit water stored in New Mexico is only beneficial to Texas if it actually receives water. This

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ensure that Elephant Butte Reservoir storage is maintained above 400,000 acre feet. *See* App. to Compl. at App. 14.

right would be meaningless if individuals and entities in New Mexico may intercept below Elephant Butte the same water that Texas demanded be released from storage. The Accrued Debit water must be able to flow into Elephant Butte Reservoir, to be released based on the normal operations of the Rio Grande Project, and then flow unimpeded by New Mexico's actions so as to benefit the State of Texas.

New Mexico's interpretation of the Compact contradicts these provisions of the Compact and this accounting structure. New Mexico focuses on the location of the delivery obligation, but in so doing, New Mexico ignores the proper understanding of the term *deliver*, and how it is used in the Compact to effect an equitable apportionment.

4. Article XI of the Compact Does Not Limit Texas' Recourse Against New Mexico

In its Motion to Dismiss, New Mexico resurrects its failed argument first made in its Opposition to Texas' Motion for Leave to File Complaint (Opp. Br.), that Article XI of the Compact limits Texas' recourse against New Mexico only for a failure to perform "at the point of delivery." *See* Opp. Br. at 12-13; N.M. Br. at 39-40. This argument is no better now than it was then. Article XI confirms that the Compact settles all controversies between New Mexico and Texas "relative to the quantity or quality of the water of the Rio Grande." Article XI

further provides, in a savings clause, that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." App. to Compl. at App. 16. A plain reading of this provision indicates that it does not prevent a state from stating a claim for relief based on another state's failure to comply with any of its obligations under the Compact, including Texas' claim that New Mexico is intercepting, depleting and interfering with Texas' equitable apportionment under the Compact.[17] Consistent with its granting Texas' Motion for Leave to File Complaint, this

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[17] In addition, and as previously pointed out by the United States (*see* U.S. Amicus Br. at 16-17), the Compact does not define "character"; however, by using the disjunctive "or" in the phrase "character or quality of the water," the term "character" arguably refers to something other than water quality. In this regard, the term "character" could have been used by the drafters of the Compact to refer to the possessory status of the water. New Mexico arguably changes the character of the water at the place of delivery by not, in fact, relinquishing complete control of the water, and instead, maintaining control by intercepting and interfering with the water after it is released from Elephant Butte Reservoir. This issue requires consideration of detailed factual information, which is beyond the scope of a Rule 12(b)(6) motion. *See Texas v. New Mexico*, 462 U.S. at 569-70 ("In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights.").

Court should not afford any weight to New Mexico's strained reading of Article XI.

B. The Compact Governs the Rio Grande Below Elephant Butte and Limits Depletions That Deprive Texas of Its Equitable Apportionment Under Conditions That Existed in 1938

The Compact protects the Rio Grande Project and its operations under the conditions that existed in 1938, and relies on the Rio Grande Project, as it operated in 1938, as the means to provide Texas its apportionment of Rio Grande water. Compl. at ¶¶ 10-11. Confronted with these allegations, New Mexico claims that its actions do not violate the Compact because there is no language in the Compact that requires New Mexico to maintain the 1938 condition on the Rio Grande below Elephant Butte. N.M. Br. at 40-48. New Mexico interprets the Compact's silence on depletions of Rio Grande water below Elephant Butte Reservoir to mean simply there is no limitation at all on such depletions. This is contrary to the Compact's stated intent to effect an "equitable apportionment" of the waters of the Rio Grande above Fort Quitman.

A compact is interpreted consistent with the drafters' background understanding of the law and the circumstances at the time the Compact was executed. *Tarrant*, 133 S. Ct. at 2133; *New Jersey*, 523 U.S. at 783-84 & n.6. In this case, the

"background understanding" is the existence and operation of the Rio Grande Project with contracts in place for delivery of Rio Grande Project water, and reclamation law governing federal reclamation projects.

1. The Compact Assumes the Existence of the Rio Grande Project and Protects the Normal Operation of the Rio Grande Project

New Mexico's argument with respect to the 1938 condition disregards all the provisions of the Compact that protect the 1938 operating conditions of the Rio Grande Project. The express terms of the Compact demonstrate that the drafters were aware of the Rio Grande Project and included terms to protect its normal operations as of 1938 conditions, so that the Rio Grande Project is used as the means to provide Texas its equitable apportionment of the Rio Grande.

The drafters' acknowledgement of the relationship between the Compact and the Rio Grande Project is apparent in the first Article of the Compact by the inclusion of the reference to the Rio Grande Project in the definitions of Project Storage and Usable Water. App. to Compl. at App. 3. The drafters were clearly aware of the Rio Grande Project's role in delivering water to irrigated lands in the Rio Grande basin, and to Mexico to meet the United States' treaty obligations.

The United States representative at the meeting of the Rio Grande Compact Commission in 1938 stated that the intent [of the Compact] was an "equitable division of the water of the Rio Grande" and that "[i]t is my belief that the interests of the United States are fully safeguarded by (a) inclusion, in the State allocations, of all water to which Federal irrigation projects are entitled . . . ." *Proceedings of the Meeting of the Rio Grande Commission, Held in Santa Fe, New Mexico, March 3 – March 18, 1938* (1938 Commission Proceedings), Letter from S.O. Harper, Chairman, Rio Grande Compact Commission, App. No. 12, at 84 (*see supra* note 8). Such a statement could not have been made without the clear understanding that the Compact recognized and relies on the Rio Grande Project for the delivery of the water apportioned to Texas.

Other provisions demonstrate the drafters' intent to protect the normal operation of the Rio Grande Project, i.e., a "normal release of 790,000 acre feet," from further development[18] of the river. For example, Article IV requires adjustments to be made to the scheduled amounts based on depletion of tributary runoff between Otowi Bridge and San

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[18] As of 1938 when the drafters signed the Compact, three storage reservoirs had been constructed: Elephant Butte (completed in 1916); El Vado (completed in 1935); and Caballo (completed in 1938). The development status is apparent from the location of the stream gaging stations originally required in Article II. *See* App. to Compl. at App. 4-5.

Marcial during July, August, and September by works constructed after 1937.[19] App. to Compl. at App. 10. This protects Texas's apportionment from upstream development by ensuring an agreed upon level of flow into Elephant Butte Reservoir and normal releases from the Rio Grande Project. The drafters provided for the necessary adjustments to deliveries into Elephant Butte Reservoir if New Mexico were to deplete river flow by building storage works above San Marcial. The drafters did not need to provide similar adjustments to river flows below Elephant Butte Reservoir because Rio Grande Project releases regulated river flow for this portion of the Rio Grande.

In fact, the Rio Grande Project was fully developed at the time the Compact was negotiated and approved. *See supra* Statement, section I pp. 4-6. New Mexico claims that the adjustment to the delivery schedule for depletions at Otowi Bridge compared to the absence of a similar adjustment for depletions below Elephant Butte supports its argument that the Compact does not limit post-1938 development below Elephant Butte. N.M. Br. at 41-43. The more reasonable interpretation of the different treatment of depletions above and below Elephant Butte is that the drafters simply

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[19] The 1948 Resolution (*see supra* note 4) did not retain this adjustment to the measurements when it substituted the gaging station below Elephant Butte Reservoir for the gaging station at San Marcial.

understood the operations of the Rio Grande Project in 1938 and intended them to continue.

The Compact also protects Project Storage to allow for "a normal release" from the Rio Grande Project. If Colorado or New Mexico have Accrued Debits stored in reservoirs constructed after 1929, then Texas may demand the release of that water to maintain the quantity of Usable Water in Project Storage at levels sufficient to allow "a normal release" of 790,000 acre feet from Project Storage in that year. App. to Compl. at App. 14-15. Thus, the drafters protected the quantity of water flowing into Elephant Butte Reservoir during dry years, or years when New Mexico and Colorado are filling reservoirs constructed after 1929.

At the same time, the drafters provided for forgiveness of these Accrued Debits in a wet year with an Actual Spill.[20] Based on the definition of Actual Spill, Elephant Butte Reservoir would be at capacity, and deliveries of Rio Grande Project water would be easily met. The drafters took great care to ensure that New Mexico delivers sufficient water into Elephant Butte Reservoir to maintain normal

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[20] The Compact defines Actual Spill to mean "all water which is actually spilled from Elephant Butte Reservoir or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir." App. to Compl. at App. 3. An Actual Spill cannot occur until all credit water has been spilled. *Id.*

releases of Rio Grande Project water for irrigation demands in Texas, Rio Grande Project lands in New Mexico, and delivery to Mexico.

Texas' interpretation of the Compact reflects these agreed upon operations of the Rio Grande Project. Texas receives its equitable apportionment under the Compact when (1) New Mexico delivers a scheduled amount of water into Elephant Butte Reservoir with the appropriate adjustments, (2) control of that water is transferred to the Rio Grande Project, (3) normal releases of Rio Grande Project water are made to satisfy irrigation demands and delivery to Mexico, and (4) the released water and Rio Grande Project return flows are allowed to flow to the intended delivery point. If New Mexico water users were permitted to intercept Rio Grande Project water, then protecting a normal Rio Grande Project release of 790,000 acre feet would have been a futile exercise. Under New Mexico's theory, the drafters would have ensured flows into Elephant Butte Reservoir, without knowing how much water would be removed from the river system below Elephant Butte Reservoir. The ability to satisfy deliveries of Rio Grande Project water to irrigation lands in the Rio Grande Basin and to Mexico would then be jeopardized based on the amount of flow depleted below Elephant Butte Reservoir. New Mexico's implausible interpretation defeats the stated intent of the Compact to effect an "equitable apportionment" of the waters of the Rio Grande above Fort Quitman by depriving Texas of any apportionment of those waters.

2. New Mexico's Obligations Below Elephant Butte Dam Are, in Part, Defined by Reclamation Law

New Mexico's understanding of its Compact obligations below Elephant Butte Reservoir discounts a critical aspect of the drafters' background understanding: the role of federal reclamation law. There would have been no reason for the drafters to address depletions below Elephant Butte Reservoir because the legal framework applicable to this portion of the Rio Grande was sufficiently clear in 1938. *See New Jersey v. New York*, 523 U.S. at 783-84 & n.6 (explaining that when silence is on the subject of settled law, background law applies).

In order to receive delivery of water stored in a federal reclamation project and distributed by project works, a user must enter into a contract with the United States to effect repayment of the project's construction costs. The practice of contracting for project water dates back to the original Reclamation Act of 1902, which authorized the Secretary of the Interior to enter into "contracts for the construction" work of projects, and to give "public notice of the lands irrigable under the project," the charges per acre upon the entries, and the number of installments in which the charges shall be paid. Act of June 17, 1902, Pub. L. No. 161, ch. 1093, § 4, 32 Stat. 389 (codified as 43 U.S.C. § 419); *see also*

Payette-Bose Water Users' Ass'n v. Bond, 269 F. 159, 177-78 (D. Idaho 1920) (describing the contract expectations of entrymen and reclamation officials, respectively, to stored waters and construction cost charges). Following the enactment of the 1902 Act and before the Compact was approved in 1938, Congress amended the requirements for different types of water service and associated contracts several times.[21] *See, e.g.*, Warren Act of Feb. 21, 1911, Pub. L. No. 61-406, ch. 141, § 1, 36 Stat. 925 (contracts for water in excess of the requirements of the lands to be irrigated by any project); Reclamation Extension Act of Aug. 13, 1914, Pub. L. No. 63-170, ch. 247, § 5, 38 Stat. 687 (authorizing charges to water right applicant, entryman, or landowner of operation and maintenance costs of the project).

Significantly, the 1926 amendments and supplements to the Reclamation Act unequivocally made a repayment contract a prerequisite to water service from a federal reclamation project:

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[21] Congress also enacted legislation specific to the Rio Grande Project in this time period. Act of June 4, 1936, Pub. L. No. 74-648, ch. 500, 49 Stat. 1463 (authorizing the canalization of the Rio Grande from the Caballo Reservoir site in New Mexico to the American Diversion Dam near El Paso, Texas); Act of Aug. 29, 1935, Pub. L. No. 74-392, ch. 805, 49 Stat. 961 (authorizing construction of the American Diversion Dam in the Rio Grande and appropriate $1 million); Act of May 28, 1928, Pub. L. No. 70-556, ch. 815, 45 Stat. 785 (amending construction payments due from Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1).

> No water shall be delivered upon the completion of any [new water] project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district . . . providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works . . . .

Omnibus Adjustment Act of May 25, 1926, Pub. L. No. 69-284, ch. 383, § 46, 44 Stat. 649 (codified as 43 U.S.C. § 423e). Thus, by the time the drafters negotiated and the signatory States approved the Compact, the requirement for a contract with Reclamation to receive Rio Grande Project water was firmly settled. The drafters had no reason to address diversions from the Rio Grande below Elephant Butte Reservoir because the legal framework for the storage and distribution of this water was clear. Reclamation law applies, and only entities that have executed repayment contracts with the United States may receive Rio Grande Project water.

Consistent with this established legal framework, the irrigation districts that receive water from the Rio Grande Project (El Paso County Water Improvement District No. 1 (EPCWID) and Elephant Butte Irrigation District (EBID)) entered into a contract with Reclamation on February 16, 1938 (1938 Contract), a month before the Compact was

signed. App. to U.S. Amicus Br. at 1a-4a. In the contract, EPCWID and EBID agreed to the authorized irrigable acreage in each district, and the distribution of available water supply in proportion to the irrigable acreage: 67/155 to lands in EPWID and 88/155 to lands in EBID. *Id.*

As the statements made by Texas Commissioner Clayton, and offered by New Mexico, confirm, the 1938 Contract governs the allocation of water released from Elephant Butte Reservoir. The Commissioner's statements, and the 1938 Contract, partially explain the Compact's silence on depletions below Elephant Butte Reservoir. *See* N.M. Br. at 43-44. New Mexico cannot divorce the 1938 Contract from the reclamation laws that govern the contract and all deliveries or diversions of Rio Grande Project water. These legal requirements also further explain the silence on depletions below Elephant Butte Dam. As the Compact drafters were aware, water users must have a contract with Reclamation before they may divert or receive delivery of Rio Grande Project water. Thus, the drafters did not need to address depletions below Elephant Butte Dam because depletions could not occur absent an allocation of and contract for Rio Grande Project water.

To reach the contrary result advocated by New Mexico, the Compact drafters would have had to deviate from settled law. It would have been necessary for the Compact to state affirmatively that New Mexico water users are *not* required to enter into a contract to divert Rio Grande Project water

stored by and released from Elephant Butte Reservoir or use return flows. The Compact drafters, however, showed no intent to modify settled reclamation law. *See New Jersey*, 523 U.S. at 783 n.6 ("the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify"). The contract requirement for Rio Grande Project water "speaks in the silence of the Compact," and further explains the absence of a provision addressing depletions below Elephant Butte Reservoir and above the New Mexico-Texas state line. *See id.* at 784.

New Mexico asserts as partial justification for its actions, and as an explanation of why the 1938 condition has no relevance to what occurs downstream from Elephant Butte, that the Rules and Regulations for Administration of the Rio Grande Compact "permits each State to develop *its* water resources at will subject only to its obligations to *deliver* water in accordance with the schedule set forth in the Compact." N.M. Br. at 46 (emphasis in original). This argument fails because New Mexico ignores that water "delivered" into Elephant Butte ceases to be "its" water. Rather, it becomes water apportioned to Texas under the Compact to be distributed by the Rio Grande Project pursuant to Reclamation law.[22]

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[22] New Mexico admits that since 1938 it has developed extensive water resources, i.e., "hundreds of wells" south of Elephant Butte and that development, post 1938, has affected

Footnote continued on following page.

3. The 1929 Temporary Compact Is Not an Appropriate Tool for Interpreting the 1938 Compact

New Mexico also cites the 1929 Temporary Compact, and offers Article XII of that compact as an example of an "explicit protection[ ] for conditions existing as of a specific date," which New Mexico argues is absent from the 1938 Compact. N.M. Br. at 44. New Mexico presents this one provision of the 1929 Temporary Compact in isolation, and claims it supports the proposition that Texas bargained for explicit protection of conditions below Elephant Butte in 1929, but did not do so in 1938. When read in harmony with the other terms of the 1929 Temporary Compact, Article XII is merely one example of several provisions included in that

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the regional water supply. N.M. Brief at 47. The "regional water supply" that New Mexico discusses is the water supply otherwise apportioned to Texas by the Compact. New Mexico also claims that wells developed in Texas somehow deplete water apportioned by the Compact. N.M. Brief at 46-47. Texas disputes this factual allegation and will be prepared to demonstrate, at trial, why this allegation by New Mexico is not true. New Mexico also makes reference to the City of El Paso's Canutillo well field. Texas will treat the effect of this well field, if any, the same as depletions by New Mexico. To the extent that those wells, in fact, intercept Rio Grande water apportioned to Texas, the quantity of water intercepted should be counted against Texas' apportionment. These determinations, however, will require extensive factual inquiry.

temporary compact to maintain the status quo on the Rio Grande until its equitable apportionment was finalized.

Article VII of the 1929 Temporary Compact provides that no advantage or right will accrue based on change in condition, construction of storage, or use of water in the years between the signing of the temporary compact and the final compact. Act of June 17, 1930, Pub. L. No. 370, ch. 506, 46 Stat. 767, 771. Consistent with the intent to maintain the existing "rights and equities of each State," Colorado agreed that it would not "cause or suffer the water supply at the interstate gauging station to be impaired by new or increased diversions or storage within the limits of Colorado unless and until such depletion is offset by increase of drainage return." Art. V, 46 Stat. 770. This pledge from Colorado in Article V mirrors exactly the pledge from New Mexico in Article XII, which provides that "New Mexico . . . will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." 46 Stat. 772.

Furthermore, all three signatory States stressed their intent as to the extremely limited application of the 1929 Temporary Compact by

including Article XVI in that compact.[23] 46 Stat 773. By offering Article XII as an interpretive tool, New Mexico ignores the directive from the drafters of the 1929 Temporary Compact not to attach any meaning to its provisions.

The express terms of the 1938 Compact, informed by the drafters' background understanding of legal and factual circumstances at the time, support Texas' interpretation that the Compact protects the operations of the Rio Grande Project under conditions existing in 1938. To the extent the Court believes extrinsic evidence is necessary to

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[23] It would be difficult to construct a provision more limiting than Article XVI:

> Nothing in this compact shall be considered or construed as recognizing, establishing, or fixing any status of the river . . . or the rights or equities of any of the signatories or . . . hereafter construed as in any manner establishing any principle or precedent as regards future equitable apportionment of the waters of the Rio Grande. The signatories agree that the plan herein adopted for administration of the waters of the Rio Grande is merely a temporary expedient to be applied during the period of time in this compact specified, is a compromise temporary in nature and shall have no other force or interpretation, and that the plan adopted as a basis therefor is not to be construed as in any manner establishing, acknowledging, or defining any status, condition, or principle at this or any other time.

Art. XVI, 46 Stat 773.

interpret New Mexico's Compact obligations below Elephant Butte, the 1929 Temporary Compact is not an appropriate tool to shed light on the intent of the drafters of the final Compact.

C. New Mexico's Interpretation Suggests the Compact Is Ambiguous, Which Would Warrant Consideration of Extrinsic Evidence at the Appropriate Stage of This Case

As explained above, New Mexico's proposed reading of the Compact produces anomalous results. At the very least, New Mexico's interpretation of the Compact suggests that the Compact is ambiguous, and the Court should, at the appropriate stage of this case, "turn to other interpretive tools to shed light on the intent of the Compact's drafters."[24] *See Tarrant*, 133 S. Ct. at 2132.

The 1938 Compact was negotiated upon a legal and factual foundation that extended in excess

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[24] Texas maintains that a determination of the drafters' intent based on extrinsic evidence is not appropriate at this stage of the litigation. *See supra* note 15. The materials lodged with the Court do not represent the full universe of historical documents relevant to such a determination. If the Court decides to consider the materials at this stage, Texas has offered discussion and evidence of the Compact negotiation history, which confirms that Texas' interpretation of the Compact is consistent with the drafters' intent.

of 50 years prior to execution of the Compact. That factual and legal background included, among many other things, the authorization, construction and operation of the Rio Grande Reclamation Project, a Treaty with the Nation of Mexico, the desire for and actions associated with more extensive water development on the middle Rio Grande in New Mexico and the upper Rio Grande in Colorado, a Temporary Compact, and then existing Supreme Court litigation between Texas and New Mexico. All of this is relevant to an interpretation of the Rio Grande Compact. *New Jersey v. New York*, 523 U.S. at 783-84. New Mexico's arguments, including its selective "factual" assertions and selective citation and quotation ignore all of this.

At the time the Compact was negotiated, New Mexico's focus was on protecting the middle Rio Grande, and in facilitating development in that portion of the River. Joint Investigation at 12-13 (describing the difficulty for the Middle section of the Rio Grande as to "the maintenance of an adequate water supply for irrigation of the lands of the Middle Rio Grande Conservancy District" versus the maintenance of the water supply for the Rio Grande Project and Hudspeth in the Elephant Butte-Fort Quitman section). *See* Hill, *Development of the Rio Grande Compact of 1938*, *supra,* at 172-73; 1938 Commission Proceedings at 18 (*see supra* note 8) (describing New Mexico's focus on Middle Rio Grande interests). In order to do so, it needed to ensure that Colorado delivered enough water at the New Mexico state line, and that its obligations to

Texas would be facilitated through the use of the then existing Rio Grande Project. This strategy is evident from the negotiating principles submitted by the New Mexico Commissioner, which emphasized (1) the protection of rights of New Mexico water users from increased storage in Colorado, (2) a willingness to negotiate with Texas "as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled," and (3) the preservation of the right of New Mexico and the Middle Rio Grande Conservancy District to develop the Middle Rio Grande and irrigate approximately 123,000 acres from the waters of the Rio Grande. *See Statement Submitted by Thomas M. McClure, Commissioner for New Mexico* (Sept. 28, 1937) in 1937 Commission Proceedings, Exh. No. 2, at 59 (*see supra* note 8). New Mexico, therefore, bargained to tie its obligations to Texas to the Rio Grande Reclamation Project, relying on that Project to ensure deliveries to Texas. Hill, *Development of the Rio Grande Compact of 1938, supra,* at 172-73.

By doing this, New Mexico would be benefitted by return flows from the use of Rio Grande Project waters on lands within southern New Mexico, thus reducing the quantity of water that it otherwise would have been obligated to deliver for the benefit of Texas. *See* Joint Investigation at 49 (explaining that in the Elephant Butte-Fort Quitman section, "the return water of each subvalley becomes available to that next lower as far as the Tornillo

heading"); *see also id.* at 47-55 (measuring the return water for the three sections of the Rio Grande). The amount of direct flows that would need to be bypassed in the middle Rio Grande in order to meet the Texas obligation was reduced by the amount of return flows from seepage, drainage and the underflow of the Rio Grande. A review of the full historic record establishes that the Compact's drafters understood that, absent the Compact accounting for Rio Grande Project return flows as part of Texas' apportionment, there would need to be greater releases from upstream sources, including the middle Rio Grande.[25] Joint Investigation at 49.

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[25] New Mexico suggests that state law governs return flows and seepage from Reclamation projects. N.M. Br. at 51 n.6. This is not accurate, and the Reclamation Policy on the Reuse of Project Water cited by New Mexico does not support this proposition. The Policy defines Rio Grande Project Water to include return flows, and further states: "Reclamation will assert and protect its interest in return flows under state law or as Federal property . . . That Reclamation may control reuse of project water is inherent in principles of property law and has been upheld in Federal case law." App. to N.M. Br. at 2. The case law to which the Policy refers includes the Supreme Court case, *Ide v. United States*, 263 U.S. 497 (1924). In *Ide*, the Supreme Court held that an appropriative right of federal reclamation project includes the right to use seepage and return flows. *Id.* at 505-06 (an irrigation project "is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is."); *see also Bean v. United States*, 143 Ct. Cl. 363, 374 (1958) ("There can be no doubt under the authorities that the Reclamation Bureau, under its appropriation of 1906 and 1908,

Footnote continued on following page.

In order to facilitate the United States' ability to provide Texas with its apportioned water, as well as make delivery to Texas, the Compact was developed in a manner that protected the Rio Grande Project. New Mexico, in fact, admits this to be true. "New Mexico agrees that one of the purposes of the Compact was to protect deliveries to the Project." N.M. Br. at 40. The fact that the Compact used the Rio Grande Project to facilitate Texas obtaining the waters apportioned to it does not transmute Texas' Compact entitlement to a mere Rio Grande Project entitlement, and somehow make Texas' apportionment subject to New Mexico State laws, as is alleged by New Mexico.

The statements made by Frank B. Clayton, Commissioner from Texas, and quoted by New Mexico, were made with this background in mind. *See* N.M. Br. at 43-44. Mr. Clayton would have assumed the commonly known facts and law as they existed in 1938, including that by delivering water to Elephant Butte, New Mexico and Texas could take advantage of the storage capacity of the reservoir, flows in the river channel, and underflow to the river, canals, laterals and drains that were all part of the Rio Grande Project. In addition, Mr. Clayton, as

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had the control and the right to prescribe the use of the seepage from lands within the project, as well as the original use of the waters.") (citing *Ide*, 263 U.S. 497) (discussing the Rio Grande Project).

well as the New Mexico negotiators, understood that the Rio Grande Project existed, and that it was under the control of the Bureau of Reclamation, therefore ensuring that flows in the river channel, and underflow to the river, canals, laterals and drains would not be interfered with and that Texas' apportionment would, in fact, reach Texas.

Mr. Clayton's statements are in perfect harmony with the factual allegations made in the Texas Complaint. This same point, in fact, was echoed in 1940 by Berkeley Johnson, the United States representative to the Rio Grande Compact Commission, when he stated that Compact water is delivered at the head of Elephant Butte Reservoir, rather than El Paso, Texas, "because the Rio Grande Project must be operated as a unit. Deliveries are made in accordance with schedules based upon discharge of the Rio Grande at key stations in each State." Berkeley Johnson Statement, *supra*, at App. 1. Operating the Rio Grande Project as a unit allows return flows from Rio Grande Project lands in New Mexico to be delivered to Texas as part of its apportionment. *Id.*; Joint Investigation at 49, 55. Indeed, this is the very point that amicus City of Las Cruces makes when it quotes the New Mexico Commissioner, at the time the Compact was negotiated, as saying that "for the purpose of the Compact, Elephant Butte Dam should be deemed the

dividing line between New Mexico and Texas."[26] Las Cruces Amicus Br. at 16.

Preservation of the 1938 conditions below Elephant Butte Reservoir was also embedded into the Compact. It was understood at the time of the Compact that there was only enough water within the lower Rio Grande to serve the existing lands within southern New Mexico and Texas, and that any additional lands would have to be served through augmentation from outside of the Rio Grande Basin. *See, e.g.*, 1938 Commission Proceedings, App. No. 7, at 58-62 (The Engineering Advisors found that "present uses of water in each of the three States must be protected in the formulation of a Compact . . . because the useable water supply is no more than sufficient to satisfy such needs."). Increased irrigation or use in New Mexico (as has occurred) would, therefore, deprive Texas of some or all of its Compact apportionment.

III. Texas' Compact Apportionment Is Not Subject to New Mexico State Law

New Mexico offers the novel theory that water equitably apportioned to Texas by the Compact is entirely dependent on an application of New Mexico's

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[26] It is telling that the Joint Investigation refers to the lower section of the Rio Grande as the "Elephant Butte-Fort Quitman Section" throughout the report. *See, e.g.*, Joint Investigation at 19-23 (describing the three sections of the Rio Grande Basin).

state water law. N.M. Br. at 49. New Mexico then describes the New Mexico state adjudication court process, arguing that because the Rio Grande Project is interconnected with the Compact, Texas (or the United States) should rely upon that process to vindicate its Compact rights. N.M. Br. at 52-58.

A. New Mexico's Reliance on *California v. United States* Is Misplaced

New Mexico's assertion that Texas' apportioned rights to Rio Grande water are entirely dependent on the administration of state water law relies on a body of law that is not at all relevant to this case. None of the cases cited by New Mexico deals with interstate rivers or with interstate compacts.

New Mexico cites *California v. United States*, 438 U.S. 645 (1978) as controlling the instant situation. In that case, this Court found that Section 8 of the 1902 Reclamation Act compelled the United States to defer to state water law and that, to the contrary, state water law governed the acquisition, administration and ownership of all water rights associated with a Reclamation Project, absent a clear congressional directive to the contrary. 438 U.S. at 678-79. New Mexico's reliance on *California v. United States*, in the instant case, is misplaced. Here, the question is not what rights the United States possesses pursuant to Reclamation Law, but rather what rights were apportioned to Texas in the

Compact. The fact that the Compact utilizes the Rio Grande Project to ensure that Texas receives the benefit of what was apportioned to it in the Compact does not transmute Texas' apportionment to a Reclamation contract supply. Indeed, Texas does not even have a contract with the United States, and is not a party to the contracts that New Mexico references within its Motion to Dismiss.

In addition, *California v. United States* did not involve an interstate river; nor did it involve an interstate compact. The reclamation project at issue there was wholly within the State of California and only served lands and individuals in California. In contrast, numerous Original Actions in this Court involving interstate water compacts have also involved Reclamation Project facilities. *Kansas v. Colorado*, 514 U.S. 673, 677-78 (1995) (Arkansas River Compact; John Martin, Pueblo, and Trinidad Reservoirs); *Oklahoma v. New Mexico*, 501 U.S. 221 (Canadian River Compact; Tucumcari and Sanford Projects); *Texas v. New Mexico*, 462 U.S. at 556 n.1 & 558-59 (Pecos River Compact; Carlsbad and Fort Sumner Projects); *Arizona v. California*, 373 U.S. 546, 555-62 (1963) (Colorado River Compact; Boulder Canyon Project). In none of those cases has it ever been suggested that state law in one state would control the compact apportionment of water in another state.

For example, the Upper Colorado River Basin Compact, Pub. L. No. 81-37, ch. 48, 63 Stat. 31 (1949), apportions water in the Upper Basin of the

Colorado River among the Upper Basin states: Arizona, Colorado, New Mexico, Utah, and Wyoming. Congress later authorized the Colorado River Storage Project to develop the water resources of the Upper Basin, authorizing the construction of Glen Canyon Dam among other dams and reservoirs and making it possible for the Upper Basin states to utilize their apportionments under the compact. Colorado River Storage Project Act of 1956, 43 U.S.C. § 620; *Friends of the Earth v. Armstrong*, 485 F.2d 1, 4-6 (10th Cir. 1973) (describing the compact and the role of the project, particularly Lake Powell, to provide storage basic storage necessary to meet delivery requirements to downstream states and Mexico). The rights to water from Lake Powell and other reservoirs in the Colorado River Storage Project are based upon the apportionment found in the Upper Colorado River Basin Compact, not on the state water law of any of the Upper Basin states.

Even if *California v. United States* were relevant, this Court specifically found that state water law did not govern if there were congressional directives to the contrary. 438 U.S. at 668 n.21; *see also* N.M. Br. at 50. The Compact is a federal law (Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785) and, thus, a "congressional directive." *See Virginia v. Maryland*, 540 U.S. at 66; *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. As such, the

Compact, not New Mexico state water law, controls how water is apportioned to Texas.[27]

B. The Compact, Not New Mexico State Water Law, Governs the Apportionment of Water to Texas

In *Hinderlider*, 304 U.S. 92, the Colorado State Engineer appealed from an adverse judgment of the Colorado Supreme Court, in which that Court had held, in effect, that the State Engineer could not curtail water rights in Colorado for the purposes of complying with the obligations of the State of Colorado under the La Plata River Compact. The ditch company asserted that the La Plata River Compact violated the vested water right granted to it by the January 12, 1898 adjudication decree, and that the vested water right so awarded could not be modified or diminished except by condemnation and payment of just compensation. Since no condemnation proceeding had been commenced, the company had successfully argued that the state was without power to curtail its water right in order to comply with the La Plata River Compact. *La Plata & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (1933); *Hinderlider v. La Plata*

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[27] New Mexico cites other cases in support of its position, but each relies upon *California v. United States* and, thus, none is relevant to this Original Action concerning an interstate compact that equitably apportions an interstate river.

River & Cherry Creek Ditch Co., 101 Colo. 73, 70 P.2d 849 (1937).

On appeal, the United States Supreme Court assumed that the water right adjudicated under the decree awarded the ditch company a property right that was indefeasible insofar as Colorado and its citizens and any other person claiming water in Colorado were concerned. The Court went on to hold, however, that the Colorado water right decree could not confer upon the ditch company rights in excess of Colorado's share of the waters of the stream, and Colorado's share was only an equitable portion thereof. *Hinderlider*, 304 U.S. at 106-07. In other words, state-created water rights only attach to that portion of an interstate stream that is equitably apportioned to the state, and the state court decree is not binding on citizens of another state who claim the right to divert water from the stream under that state's equitable share of the interstate stream. When an apportionment of the waters of the interstate stream is made by compact, the apportionment is binding on the citizens of each state and all water claimants, including water right owners whose rights predate the compact. *Id.* at 106; *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36, 849 P.2d 372 (1993) (citing *Hinderlider*, 304 U.S. 92) (stating that "[t]he apportionment of water under state compacts is binding on private water claimants"). No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. at 564.

The State of New Mexico, in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact, and obligated itself to deliver water to the Rio Grande Project, that would be stored, released and delivered to Reclamation's contractors in New Mexico and Texas, and by treaty to Mexico. New Mexico agreed not to interfere with Rio Grande Project operations that existed when the Compact was executed in 1938. The Rio Grande Compact is federal law and the Rio Grande Project right encompassed in the Compact cannot be undermined by New Mexico state law, nor the New Mexico state court adjudication.[28] Arguing that New Mexico state law controls what Texas is entitled to under the Compact ignores the effect of the Compact

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[28] New Mexico describes what has occurred or what is occurring in the state court adjudication. N.M. Br. at 16-19, 52-56; *see also* Las Cruces Amicus Br. at 20-27. This discussion is not relevant to a Rule 12(b)(6) motion and, in any event, is premised upon the faulty presumption that New Mexico state water law determines what was apportioned to Texas under the Compact. Moreover, the discussion itself is merely a more detailed re-argument of New Mexico's position that the state adjudication court is an appropriate alternative forum in which Texas can litigate its claims. The New Mexico state court adjudication, far from vindicating any position asserted by New Mexico, demonstrates that New Mexico is preventing the Rio Grande Project from being operated as is contemplated in the Compact, and preventing Texas from receiving water equitably apportioned to it under the Compact.

(indeed, it ignores the Compact) on New Mexico's responsibility to ensure its Compact obligations are satisfied. Those Compact obligations are superior to the rights of other New Mexico appropriators of water in the Lower Rio Grande, regardless of the rights and priorities adjudicated through application of New Mexico state laws. In addition, proceeding as New Mexico contends would lead to the implausible result of requiring Texas to have its sovereign rights determined by a New Mexico official.

New Mexico state law, in whatever form it takes, cannot be used to deny Texas water apportioned to it pursuant to the Compact, or the United States the ability to meet its treaty obligations to Mexico. Any application of New Mexico state law to the Rio Grande Project and its delivery to Texas must fail as inconsistent with the Compact.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that New Mexico's Motion to Dismiss be denied.

Respectfully submitted,

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FUNCTION, ORGANIZATION, AND PROCEDURE OF THE RIO GRANDE COMPACT COMMISSION

by Berkeley Johnson, Chairman.

The Rio Grande Compact was signed on March 18, 1938 by the Commissioners for the States of Colorado, New Mexico, and Texas and approved by the Chairman of the Commission, Mr. S.O. Harper, for the United States. The State representatives were H.C. Hinderlider for Colorado, Thomas M. McClure for New Mexico, and Frank B. Clayton for Texas. During the early part of 1939 the Compact was ratified by the Legislatures of the three States and approved by Congress, and on May 31, 1939 was signed by the President of the United States.

The object of the Compact is to apportion the waters of the Rio Grande equitably among the States of Colorado, New Mexico, and Texas. Water is delivered by Colorado at the Colorado-New Mexico State Line and by New Mexico at San Marcial, New Mexico, at the head of Elephant Butte reservoir, this point being chosen rather than El Paso, Texas, because the Rio Grande Project must be operated as a unit. Deliveries are made in accordance with schedules based upon discharge of the Rio Grande at key stations in each State.

In this short paper it would be impossible to give in detail the terms of an agreement which is the culmination of nine years of deliberations. In

general, it may be said that the Compact attempts to provide for the equitable use of the water supply by a system of water debits and credits and storage of the surplus waters of the Rio Grande. Water which is stored in upstream reservoirs is always available to reservoirs or lands lower on the stream system; on the other hand, surplus water arriving at the lowest reservoirs, Elephant Butte and Caballo, will spill and be lost to the entire basin. For this reason the storage of "debit" water in upstream reservoirs is permitted, provided that it shall be available at all times to downstream users should their supplies become deficient. Upstream users are also protected against excessive uses by the lower States. In effect, the system of schedule deliveries limits the depletion of the stream in each State based upon the water supply available. It is believed that such a plan will do much to eliminate wasteful and non-beneficial uses and to encourage beneficial consumption of the available supplies.

The function of the Commission is to collect, correlate, and present factual data; to preserve all records having a bearing upon the administration of the Compact; and, by unanimous action, to make recommendations to the respective States upon matters connected with such administration. Should any State fall behind in its water delivery schedule or in any way fail to live up to the terms of the Compact, it shall be the duty of the Commission to report the same to the proper administrative officials of such State and to recommend that they take suitable action to remedy the situation. The

Commission shall prepare an annual report for transmission to the three Governors, reviewing the administration of the Compact during the preceding year.

The Commission shall see that suitable and proper stream gaging stations, reservoir-stage recorders, rainfall and evaporation stations and other installations necessary to a proper collection of factual data are maintained.

In general, the Commission is merely a fact-finding body whose duty is to report its findings to the proper administrative officials of the three States for suitable action.

The Rio Grande Compact Commission is composed of one representative from each State. The State Engineers of Colorado and New Mexico are ex-officio Commissioners for their respective States, and the Texas Commissioner is appointed by the Governor of Texas. Upon the resignation of Frank B. Clayton the Governor appointed Julian P. Harrison as Commissioner for Texas. In addition, the President of the United States was requested to designate a representative of the United States to sit with the Commission and act as Chairman without vote. On August 6, 1939 I had the honor of being designated by the President as representative of the United States to the Compact Commission.

In connection with its duties the Commission "may employ such engineering and clerical aid as

may be reasonably necessary" for the proper administration of the terms of the Compact. At a meeting in December, 1939, the Commission employed a secretary, Paul H. Berg, to serve for the year 1940. His duties, subject always to the authority of the Commission, are to keep the records and correspondence of the Commission and to tabulate and correlate the basic data. His work commenced January 1st of this year and so far has consisted in looking over the Rio Grande Basin and meeting the various officials and others with whom he will have future dealings. As the hydrographic data gradually become available he will assume his regular duties.

Since August 4, 1939, four Commission meetings have been held to agree upon and draft the terms of a set of rules and regulations for the administration of the Compact. A form was drawn and was finally approved and signed by the three Commissioners at the El Paso meeting December 19, 1939.

The Rules and Regulations cover the subject of installation, maintenance, and operation of necessary stream gaging and reservoir stations mentioned in Article 2 of the Compact, plus certain necessary evaporation stations. They contemplate the need, from time to time, of rechecking the areas and capacities of Compact reservoirs which may be affected by silting. They provide for the investigation of new projects which, if constructed and operated, might affect the index inflows in

Colorado or New Mexico and necessitate adjustment in the application of the schedules. They recognize the need for quality of water studies in the event drains are built from the Closed Basin in Colorado, and for determinations of amounts of water brought into the Rio Grande basin by possible transmountain diversions. The duties of a Secretary to the Commission and the terms of his employment are covered by the Rules and Regulations. Included also is the matter of payment of costs incident to the administration of the Compact, and the provision for the annual meetings and other meetings that may prove necessary.

The Rules and Regulations of procedure are not immutable, hence they may be changed or amended from time to time as conditions and experience may prove necessary.

Berkeley Johnson.

January 7, 1940.

RECORD
AND
BRIEFS

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS'S COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS'S COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

JURISDICTION

The Court granted Texas's motion for leave to file a bill of complaint on January 27, 2014. The Court granted the United States' motion for leave to intervene as a plaintiff on March 31, 2014. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. The jurisdiction of this Court rests on Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. 1251(a) and (b)(2).

STATEMENT

A. Introduction

The State of Texas has filed a complaint to enforce its rights under the Rio Grande Compact (Compact).

See Act of May 31, 1939, ch. 155, 53 Stat. 785; Tex. Compl. App. 1-20. The Compact apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir, a federal Bureau of Reclamation (Reclamation) project. Elephant Butte Reservoir is approximately 105 miles north of the Texas state line. That reclamation project was authorized, constructed, and already was delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact.

Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that flows into Texas. At the Court's invitation, the United States filed a brief as amicus curiae after Texas filed its motion for leave to file a complaint, recommending that the Court grant Texas leave to file its complaint. On January 27, 2014, the Court granted Texas leave to file its complaint and invited New Mexico to file a motion to dismiss, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6).

After the Court granted leave for Texas to file its complaint, the United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention based on several distinct federal interests that are at stake in this dispute over the interpreta-

tion of the Compact. On March 31, 2014, the Court granted the United States' motion for leave to intervene.

New Mexico has moved to dismiss the complaints filed by Texas and the United States. New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's operations downstream of Elephant Butte Reservoir are controlled by state law, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users. This brief is filed in response to New Mexico's motion to dismiss.

B. The Rio Grande Basin

The Rio Grande River rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville. Tex. Br. in Supp. of Compl. 5-6 & n.2; Tex. Br. in Supp. of Compl. App. A1 (map).

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. The Basin is approximately 700 miles long and has a drainage area of approximately 34,000 square

miles. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 7, 296, 299 (1938) (*Joint Investigation*).

C. The Rio Grande Project

1. In the 1890s, regular water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions upstream. *Joint Investigation* 8, 73. In response, in 1896, the Department of the Interior (Interior) imposed an embargo on any new use of federal land for diversion works to take water from the Rio Grande in Colorado and the Territory of New Mexico. *Id.* at 8; see *Waters of the Rio Grande & Its Tributaries*, H.R. Doc. No. 39, 62d Cong., 1st Sess. 2 (1911). Interior also continued to investigate the potential for storage and irrigation projects in the upper Rio Grande Basin, which is the portion of the river above Fort Quitman. *Joint Investigation* 8, 73.

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, the State of Texas, and other western States, Reclamation presented detailed results of an engineering analysis and proposed to build a dam near Engle, New Mexico, at the current site of Elephant Butte Reservoir. See U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-4*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 395-420 (1905). Reclamation further recommended that water from the reservoir be delivered to Texas and New Mexico in amounts proportional to the irrigable lands within each State. *Id.* at 425. Representatives from Texas and New Mexico, as

well as a delegation from Mexico, "heartily endorse[d] and approve[d]" the project "as a happy solution of a vexed question that has embarrassed the parties interested." See *Official Proceedings of the Twelfth National Irrigation Congress* 107 (Guy E. Mitchell ed., 1905).

2. The Reclamation Act, enacted in 1902, provided authorization and funding for irrigation works in various States, as well as the Territory of New Mexico. See Reclamation Act, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Secretary of the Interior (Secretary) was authorized to proceed with construction of the dam only after determining that there was "sufficient land in New Mexico and in Texas which can be supplied with the stored water" at a price sufficient to reimburse the federal government for the cost of the project. *Ibid.*

In 1906 and 1908, the United States filed notices with the Territory of New Mexico of the United States' intent to utilize specified waters of the Rio Grande. *Joint Investigation* 73. The 1906 filing provided notice that the United States intended to use "730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River" in what would become the Rio Grande Project (Project). Mot. to Dismiss App. 8-9. In 1908, Reclamation provided notice that the United States intended to use "[a]ll the unappropriated water of the Rio Grande and its tributaries, said water to be diverted

or stored from the Rio Grande River" in the Project. *Id.* at 13. Upon submitting such notices, the unappropriated "waters so described * * * shall not be subject to further appropriations under the laws of New Mexico." 1905 N.M. Laws 277 (ch. 102, § 22); 1907 N.M. Laws 85-86 (ch. 49, § 40).

The Rio Grande Project extends from San Marcial, New Mexico, a town located on the Rio Grande about 160 miles north of the New Mexico-Texas state line, down to Fort Quitman, Texas, about 80 miles southeast of El Paso. Construction of the Project began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. *Joint Investigation* 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73; see *id.* at 85.

The Project is designed to deliver more water than it releases from Elephant Butte and Caballo Reservoirs. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off agricultural fields into drains. When these "return flows" get back to the river, they become part of the water that can be delivered to Project beneficiaries downstream. Return flows have historically comprised a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

3. In 1906, Reclamation entered into contracts with two irrigation districts—the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land, 67,000 acres in Texas and 88,000 acres in New Mexico. *Joint Investigation* 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. App., *infra*, 1a-4a. The 1938 contract provides that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Id.* at 2a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico. The contract was also signed by the Assistant Secretary of the Interior. *Id.* at 4a.

4. In addition to the water that the Project delivers to EBID and EPCWID pursuant to contracts with Reclamation, the Project also delivers water to Mexico to fulfill the United States' obligations under a treaty between the United States and Mexico. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre feet of water per year delivered from the Project. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., art. II, 34 Stat. 2954 (1906 treaty). Under Article I of the treaty, the United States agreed to begin delivering water to Mexico "[a]fter the completion of the proposed storage dam near Engle, New Mexico, and the distrib-

uting system auxiliary thereto, and as soon as water shall be available in said system for the purpose." 34 Stat. 2953-2954.

5. Today, Reclamation continues to calculate diversion allocations under the Project pursuant to the treaty and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement (the 2008 Operating Agreement) entered into by Reclamation, EBID, and EPCWID. Under that 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. See Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf (*Supplemental Environmental Assessment*). After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 13-14, 18.[1]

D. The Rio Grande Compact

The establishment of the Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The embargo on use of federal land for large diversion works in Colorado and New Mexico was

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[1] New Mexico has filed a suit in federal district court to challenge the 2008 Operating Agreement. See *New Mexico* v. *United States*, No. 11-CV-0691 (D.N.M. Aug. 8, 2011).

lifted in 1925, however, and operation of the Project did not address concerns about development upstream of Elephant Butte Reservoir that was depleting the water supply to the Project. Accordingly, in 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate and enter into, subject to congressional approval, a compact or agreement "providing for an equitable division and apportionment" of the waters of the Rio Grande and its tributaries. Act of Mar. 2, 1929, ch. 520-521, 45 Stat. 1502.

To maintain the status quo on the river pending negotiation of a permanent compact, the States of Colorado, Texas, and New Mexico agreed to an interim compact, which Congress approved. Act of June 17, 1930, ch. 506, 46 Stat. 767. Article VII(a) of the interim compact called for a commission of three members composed of a representative appointed by the Governor of each State for purposes of concluding a compact "for the equitable apportionment of the use of the waters of the Rio Grande among said States." 46 Stat. 771. To preserve the rights and equities of each State pending completion of a final compact, Article VII(b) of the interim compact provided that the commission "shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of th[e] [interim compact]," *i.e.*, 1929. *Ibid.*

Article XII of the interim compact provided that "New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or

increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." 46 Stat. 772.

The interim compact was extended to June 1, 1937, when the parties were unable to reach a permanent agreement, Act of June 5, 1935, ch. 177, 49 Stat. 325; see *Joint Investigation* 8-9, and the congressional Natural Resources Committee appointed a board to review the situation and recommend appropriate action, *Joint Investigation* 10. The board gathered facts about "the available water supply, the water uses and requirements, and the possibilities of additional water supplies by storage, importations[,] and salvage of present losses and wastes." *Id.* at 11. The Natural Resources Committee released the results of the investigation in 1937 in the comprehensive *Joint Investigation* report. With that information, and with the participation of a federal representative, see Art. VII(a), 46 Stat. 771, the States were able to negotiate a permanent compact.

The States signed the Rio Grande Compact on March 18, 1938, approximately one month after EPCWID and EBID entered into the contract confirming the acreage in each State that would receive Project water. See p. 7, *supra*. Congress approved the Compact the following year. 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and "for the purpose of effecting an equitable apportionment of such waters." Preamble, 53 Stat. 785.

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gaging stations. 53 Stat. 787-788.

Article IV requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission, established under Article XII of the Compact, 53 Stat. 791, relocated the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. para. 13; Mot. to Dismiss. 11 n.2.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of credits and debits. It establishes limits on the total amount of credits and debits that an upstream State may accrue, and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte Reservoir] at all times to the extent of its accrued debit." 53 Stat. 789-790.

Article VII provides that Colorado and New Mexico may not store additional water in reservoirs constructed after 1929 "whenever there is less than 400,000 acre feet of usable water in project storage," unless actual releases from the Project from the beginning of the calendar year have aggregated to more than an average of 790,000 acre feet per year. 53 Stat. 790. Article VIII permits Texas to demand that Colo-

rado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in the Project to 600,000 acre feet. *Ibid.* The release of stored water under Article VIII is to be made at the greatest rate practicable and in amounts sufficient to allow for "a normal release of 790,000 acre feet * * * from project storage in that year." *Ibid.*

The combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "[p]roject storage." Art. I(k), 53 Stat. 786. The only other such reservoir is Caballo Reservoir, described above. See p. 6, *supra*. The Compact defines "[u]sable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 791.[2]

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[2] Article XVI of the Compact provides that "[n]othing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to

E. The State Water Adjudication

A New Mexico state court is currently determining the rights to water of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 Docket entry (Docket entry) (N.M. 3d Jud. Dist. Sept. 24, 1996).

1. That action began in 1986, when EBID filed a complaint in New Mexico state court for an adjudication of water rights between Elephant Butte Reservoir and the New Mexico-Texas state line, naming the United States as a defendant under the waiver of sovereign immunity contained in the McCarran Amendment, 43 U.S.C. 666. The United States moved to dismiss the suit on the ground that the McCarran Amendment did not permit joinder of the United States unless the entire main stem of the Rio Grande in New Mexico—from the Colorado state line to the Texas state line—was to be adjudicated. The New Mexico Court of Appeals rejected that argument, concluding that the Compact effectively divided the Rio Grande into separate "river system[s]" for purposes of the McCarran Amendment. *Elephant Butte Irrigation Dist.* v. *Regents of N.M. State Univ.*, 849 P.2d 372, 373 (N.M. App.), cert. denied, 851 P.2d 481 (N.M. 1993) (Tbl.).

The New Mexico State Engineer next moved to dismiss the state water adjudication on the ground that the state court did not have jurisdiction over Project water users in Texas, who were indispensable parties. See *United States* v. *City of Las Cruces*, 289

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the Indian Tribes, or as impairing the rights of the Indian Tribes." 53 Stat. 792.

F.3d 1170, 1178 (10th Cir. 2002) (discussing motion to dismiss state-court proceedings). After the state court denied that motion, the State Engineer agreed to realign as a plaintiff and commenced the current general stream adjudication. *Ibid.*

After the district court denied the State Engineer's motion, the United States filed an action to quiet title to water for the Project in federal district court on the ground that because the Project has interstate and international obligations to deliver water, the Project right should be fully adjudicated in one proceeding rather than in separate proceedings in New Mexico and Texas state courts. See 97-cv-00803 Docket entry No. 245, at 16-17, 21 (D.N.M. Aug. 22, 2000). The Tenth Circuit ordered that the action be stayed in favor of the state water adjudications, stating that the United States' suit was for "declaratory relief seeking a determination of the relative rights of the United States and the named defendants," and "[t]he question of whether and how Rio Grande water should be apportioned among states is not directly at issue." *City of Las Cruces*, 289 F.3d at 1185-1186, 1192-1193.

2. The state court has concluded that the Project's water right is a surface right only, and that the Project is not entitled to "groundwater." Docket entry, at 2 (Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/779-ordgrantstatemtndismiss.pdf (8/16/12 Order). The court acknowledged that there is "an interactive relationship between groundwater and surface water * * * within many New Mexico stream systems, including the Rio Grande reach downstream of Elephant Butte Dam," but the court stated that New Mexico law "nevertheless recognizes surface water

and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court explained that, under New Mexico law, "groundwater can only serve as the source of water for a groundwater right when a well has been drilled." 8/16/12 Order 2. The court concluded that because the Project only has structures in place to divert surface water, but no wells, and because the 1906 and 1908 notices filed with the New Mexico Territorial Engineer "do not indicate that the United States intended to establish a separate groundwater right," the United States only "has established a right to surface water under New Mexico law for purposes of the adjudication." *Id.* at 5-6.

The state court acknowledged that the Project relies on "reuse of water" in that the Project typically is able to deliver more water than is released from project storage. 8/16/12 Order 6. The court further acknowledged that "seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water." *Id.* at 7. The court concluded, however, that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." *Ibid.* (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). The court stated that "[d]etermining whether Project water retains its identity as Project water is a condition-specific and technical inquiry" that would need to be determined in administrative proceedings before the State Engineer. *Ibid.*

The state court has also quantified the United States' right to store water, to release from storage a normal annual release of 790,000 acre feet, and to divert water at diversion dams in New Mexico "without limitation on the diversion amount." Docket entry, at 2-3 (Feb. 17, 2014), https://lrgadjudication.nmcourts.gov/index.php/component/docman/doc_download/730-order-1-granting-sj-re-amnts-2-deny-sj-re-priority-3-deny-sj-to-pre-1906-clmnts-set-hrg7b86.pdf?Itemid=102 (2/17/14 Order).

The United States requested that the state court's quantification of the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre feet per year, as recognized by a Texas water-rights decree. Docket entry, at 2, 28 (Apr. 24, 2013), https://lrgadjudication.nmcourts.gov/index.php/component/docman/doc_download/524-united-states-memorandum-in-support-of-motion-for-summary-judgment7b86.pdf?Itemid=102; see *In re Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex. Oct. 30, 2006). The court declined to recognize the Project's right to deliver water sufficient to satisfy the Texas decree. 2/17/14 Order 3-4. The court explained that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." *Id.* at 4. The court did not mention the Project's need to deliver water to Mexico.

F. The Current Controversy

1. In this original action, Texas contends that once New Mexico delivers water to Elephant Butte Reser-

voir, as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Tex. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground" downstream of Elephant Butte in New Mexico. *Id.* para. 18.

Texas contends that if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir in excess of Project allocations, deliveries of water to Project beneficiaries in Texas and to Mexico cannot be assured. Tex. Compl. para. 11. Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. *Id.* paras. 18, 19.

In particular, Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." Tex. Compl. para. 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which in turn requires additional releases from Elephant Butte and thereby decreases the amount of water stored in the Reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas

state line, causing substantial and irreparable injury to Texas." *Id.* para. 19.

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Tex. Compl. 15-16.

2. In its brief opposing Texas's motion for leave to file a complaint, New Mexico contended, *inter alia*, that the Court should deny Texas leave to file because the United States was a required party that had not consented to joinder. Br. in Opp. 31-34. New Mexico contended that "the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project." *Id.* at 33. New Mexico explained that "[t]he United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas," and that "[a]ny decree entered in the absence of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir." *Id.* at 33-34.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene in this action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact.

First, the United States noted that the parties' dispute concerns water released from a federal project that Reclamation operates, including by setting the diversion allocations for Project water users down-

stream of Elephant Butte Reservoir. See p. 8, *supra* (describing 2008 Operating Agreement). The United States explained that if the Court were to determine in this action that New Mexico does not violate the Compact by allowing New Mexico users to extract water that is hydrologically connected to the Rio Grande from below Elephant Butte Reservoir—either without a contract with the Secretary or in excess of their contractual amounts—that conclusion would undermine the assumptions underlying the United States' calculation of diversion allocations between EBID and EPCWID pursuant to the 2008 Operating Agreement. Mem. in Supp. 5-6. That is because the effect of the 2008 Operating Agreement, under which Reclamation determines how much water is available for delivery using a regression analysis that is based on 1951-1978 hydrological conditions, is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico. *Supplemental Environmental Assessment* 4, 12.

Second, the United States identified its interest in ensuring that New Mexico water users who do not have contracts with the Secretary for delivery of Project water, or who use Project water in excess of the amounts in their contracts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries. Mem. in Supp. 7-8. The United States explained (*id.* at 7) that, since 1902 and consistently through subsequent amendments and supplements to reclamation law, Congress has required a contract with the Secretary as a prerequisite to obtaining water from a reclamation project. See, *e.g.*, Reclamation Act, ch. 1093, §§ 4-5 (1902), 32 Stat. 389

(43 U.S.C. 431, 439, 461); Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e). This statutory requirement, the United States continued (Mem. in Supp. 8), has been in place and applicable to the Project since the Compact was signed in 1938, and it was specifically reaffirmed by Congress in the same year that it approved the Compact. See Reclamation Project Act of 1939, ch. 418, § 9(d), 53 Stat. 1195 (43 U.S.C. 485h(d)).

Third, the United States pointed to its interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See pp. 7-8, *supra*. The United States explained that, even with the 2008 Operating Agreement in place, uncapped use of water below Elephant Butte Reservoir could reduce Project efficiency to a point where 60,000 acre feet of water per year could not be delivered to Mexico. Mem. in Supp. 8. The United States further explained that, under Article II of the 1906 treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See 34 Stat. 2954 (in the case of extraordinary drought, "the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States"). If surface water deliveries to irrigation districts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual

amounts, the United States would have to carefully consider whether Article II of the treaty would call for a proportional reduction of its delivery obligation to Mexico during an extraordinary drought. Mem. in Supp. 8-9.

In its complaint in intervention, the United States requested a declaration that New Mexico (i) may not permit New Mexico water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico, (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and (iii) must affirmatively act to prohibit such interception and interference. U.S. Compl. 5. The United States also requested injunctive relief and an order mandating that New Mexico affirmatively prevent such interception and interference. *Ibid.*

On March 31, 2014, the Court granted the United States' motion for leave to intervene.

3. As proposed by the Court's order granting Texas leave to file its complaint, New Mexico has filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's water rights below Elephant Butte Reservoir are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project

deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61).

SUMMARY OF ARGUMENT

I. The Court should deny New Mexico's motion to dismiss because Texas and the United States have stated claims under the Compact upon which relief can be granted.

A. The States entered the Compact to effect an equitable apportionment of the waters of the Rio Grande above Fort Quitman, Texas. Texas receives its equitable apportionment under the Compact in the form of water released by the Project "in accordance with irrigation demands," Art. I(*l*), 53 Stat. 786, after the water is delivered into "[p]roject storage" by New Mexico at Elephant Butte Reservoir, Art. I(k), IV, 53 Stat. 786, 788. Texas's apportionment of water under the Compact includes seepage and return flows from Project deliveries. The Compact also protects hydrologically connected groundwater, to the extent that pumping the groundwater has an effect on the amount of water that is available for delivery to Texas water users.

B. Because Texas receives its equitable apportionment under the Compact through Project deliveries for irrigation, New Mexico's interference with those deliveries, including by taking return flows, seepage, or hydrologically connected groundwater, is a violation of the Compact. New Mexico itself not required to deliver any particular amount of water to the New Mexico-Texas state line. But New Mexico does have a duty under the Compact to prevent its water users from diverting Project water that Recla-

mation releases from the reservoir to meet irrigation demands in Texas and hydrologically connected groundwater.

New Mexico agreed in Article I(*l*) of the Compact that water delivered into project storage at Elephant Butte would become "[u]sable water" for the Project to release in accordance with irrigation demands. 53 Stat. 786. By taking water below Elephant Butte Reservoir that was released by the Project for an agreed-upon purpose, New Mexico is breaching the parties' agreement. By intercepting Project water released from Elephant Butte Reservoir, New Mexico is also in breach of its obligation under Article IV of the Compact to "deliver" the water—and thus to relinquish control of it—at Elephant Butte Reservoir. 53 Stat. 788.

C. New Mexico contends that its obligations with respect to water that is released from Elephant Butte Reservoir arise under state law, not under the Compact, and that any complaints about New Mexico's interference with Project deliveries must be addressed through a suit brought by the United States under New Mexico state law to protect the Project right from interference by junior groundwater appropriators. Both of those premises are flawed.

1. Although Section 8 of the Reclamation Act, 43 U.S.C. 383, states that the Act is not intended to interfere with state laws relating to the control, appropriation, use, or distribution of water used in irrigation, the application of state law cannot override other specific directives of Congress. The Compact is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. New Mexico's interference with

Project deliveries must also comply with reclamation law, which has long established that only entities having contracts with the United States may receive deliveries of project water, including seepage and return flows. New Mexico's authority to regulate water below Elephant Butte Reservoir is also subject to the United States' treaty obligation to deliver 60,000 acre feet of water per year to Mexico for irrigation.

2. Furthermore, New Mexico's contention that the United States can protect the Project water right from interference by making a priority call on the river, to be decided by the New Mexico State Engineer, is unpersuasive. A State cannot be its own judge in a controversy with a sister State, and there is no justifiable reason why Texas's Compact apportionment must be defined by the New Mexico State Engineer. Moreover, the Project right that New Mexico contends the United States can enforce through state proceedings explicitly does *not* include a right to deliver water to Texas under the Compact. Finally, because the New Mexico state trial court has concluded that the Project right does not include "groundwater," a call on the river to shut down junior groundwater pumpers would not be sufficient to protect Texas's Compact apportionment.

3. Finally, Article XI of the Compact, which provides that nothing in the Compact "shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another," 53 Stat. 791, clarifies one type of claim that can be brought under the

Compact, but it does not eliminate claims based on other violations of the Compact.

II. Even if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the United States, the Court's exercise of its original jurisdiction over the United States' complaint is appropriate in this case.

The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and the United States has a right protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands, and to Mexico. The importance of this case to each of the sovereigns involved warrants the Court's exercise of its original jurisdiction.

ARGUMENT

New Mexico has filed a motion to dismiss the complaints in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. Under Rule 12(b)(6), a court must proceed "on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Applying that principle here, the Court must accept as true that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts." U.S. Compl. para. 13; see Tex. Compl. paras. 18-19. The Court

must also accept as true that "these extractions have a direct adverse impact on the amount of water delivered to Texas." Tex. Compl. para. 18; see U.S. Compl. para. 14 ("[E]xtraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.").

The relevant question is whether, assuming the factual allegations in the complaint are true, the plaintiff has "state[d] a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570)). For the reasons set forth below, Texas and the United States have alleged a violation of the Rio Grande Compact by New Mexico, and New Mexico's motion to dismiss should therefore be denied.

I. TEXAS AND THE UNITED STATES HAVE STATED A CLAIM UNDER THE COMPACT UPON WHICH RELIEF CAN BE GRANTED

A. Texas Receives Its Equitable Apportionment Under The Compact Through Project Deliveries

1. The preamble to the Compact declares that the States' purpose in entering into the Compact was to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." 53 Stat. 785. Consistent with that purpose, the Compact defines the "Rio Grande Basin" as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Accordingly, the water the States agreed to equitably apportion through the Compact extends down to Fort Quitman, Texas, which

is 80 miles southeast of El Paso, at the southernmost point of the Rio Grande Project's irrigation works.

To accomplish that apportionment, the Compact first requires Colorado to deliver a specific quantity of water to the New Mexico state line. Art. III, 53 Stat. 787. Colorado's equitable apportionment thus constitutes all of the water above the Colorado-New Mexico state line, minus Colorado's Article III delivery requirement. The Compact then requires New Mexico to deliver a specific quantity of water to Elephant Butte Reservoir. Art. IV, 53 Stat. 788. New Mexico's equitable apportionment thus includes in the first instance all of the water between the Colorado-New Mexico state line and Elephant Butte Reservoir, minus New Mexico's Article IV delivery requirement.

Once New Mexico "deliver[s]" the water to Elephant Butte Reservoir as required by Article IV (*i.e.*, into "[p]roject storage," Art. I(k), 53 Stat. 786), New Mexico relinquishes control over that water. It becomes "[u]sable water" in "project storage," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. In its operation of the Project, Reclamation controls the releases for those uses described in Article I(*l*) pursuant to the federal contracts and the 1906 treaty that were already in place when the Compact was signed, and pursuant to the agreement between EBID and EPCWID—signed one month before the Compact was signed—to freeze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for EBID and 43% for EPCWID. App., *infra*, 1a-4a. As the Compact Commissioner for Texas explained in response to a letter from an attorney for downstream

Rio Grande interests who inquired why the Compact did not provide for a specific amount of water to be delivered to Texas, see Mot. to Dismiss App. 29-30, "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation" in which "the total area is 'frozen' at the figure representing the acreage [then] in cultivation," *id.* at 32; see *id.* at 26.

By operation of these provisions, New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water, through the Project, in the form of water released by the Project "in accordance with irrigation demands." Art. I(*l*), 53 Stat. 786. Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in EBID and EPCWID, respectively.

2. Texas's apportionment of water under the Compact in the form of deliveries from the Project, and New Mexico's apportionment below Elephant Butte Reservoir also in the form of such deliveries, include water from seepage and return flows from Project deliveries. That operating principle is consistent with the Project's design and historical practice, and it is an important assumption underlying Reclamation's current method of calculating diversion allocations among EBID, EPCWID, and Mexico pursuant to the 2008 Operating Agreement. See p. 8, *supra*. Reclamation calculates how much water is available for delivery (including seepage and return flows) from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See *Supple-*

mental Environmental Assessment 3-7, 12. Under those conditions, for example, the release of 763,842 acre feet of water from the Project would result in the delivery of 931,897 acre feet of water, because of return flows making their way back into the river for further delivery downstream. *Id.* at 12.[3] Reclamation subtracts the 60,000 acre feet of water due to Mexico pursuant to the treaty, and then assigns 43% of the available water to EPCWID in Texas and 57% to EBID in New Mexico. *Id.* at 13-14, 18.

Reclamation's assumption in its calculation that seepage and return flows from Project releases are available for re-use downstream is based on the clear historical understanding of the Project's intended operation. In 1911, in a report to Congress that justified issuing certificates of indebtedness against the reclamation fund to complete projects for which that fund had proved insufficient, see Act of June 25, 1910, ch. 407, 36 Stat. 835, Reclamation described the importance of return flows to the Project. It stated that "[i]n addition to losses in the distribution system there will be losses in transit between the reservoir and diversion dams. * * * The losses in transit, however, will be partly offset by the return seepage in upper parts of the valley, which will be available for diversion lower down." *Fund for Reclamation of Arid Lands*, H.R. Doc. No. 1262, 61st Cong., 3d Sess. 106 (1911).

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[3] 763,842 acre feet of usable water in the Project is what Reclamation considers to be "Full Project supply." *Supplemental Environmental Assessment* 12. Articles VII and VIII of the Compact are designed to maintain an average annual release from the Project of 790,000 acre feet. See 53 Stat. 790.

After the dam at Elephant Butte was constructed, and a few years before the Compact was signed, Reclamation issued a report describing the water supply for the Project. That report stated that "[r]eturn flow developed by the construction of the project drainage system is available for rediversion at the successive diversion points through the 140-mile length of the irrigated valleys constituting the Rio Grande project." U.S. Dep't of the Interior, *Rio Grande Federal Reclamation Project New Mexico-Texas* 3 (1936). The report explained that "[t]he combination of released stored water, return flow, and a portion of the tributary side inflow has proven to be an adequate, reliable, and dependable supply for the 155,000 acres to which the development of the organized Federal project has been limited plus an allowance of 60,000 acre-feet per annum to Mexico." *Ibid.*

Similarly, the 1937 *Joint Investigation*, which included a comprehensive analysis of water use and supply in the Rio Grande Basin and formed the basis for the Compact, makes clear that return flows have historically comprised a significant portion of the Project's deliveries. See *id.* at 47-49, 55, 100. The Natural Resources Committee explained that, "[i]n estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration." *Id.* at 49.

3. The Compact necessarily limits the extraction of hydrologically connected groundwater, to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands.[4]

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[4] In the past, New Mexico has taken inconsistent positions on the Compact's apportionment of water below Elephant Butte Reser-

When water is extracted from the ground at places downstream of Elephant Butte Reservoir, it impairs deliveries of Project water. That is because pumping either directly intercepts Project water that would otherwise return to the river, or alters groundwater gradients and water table elevations, thereby preventing Project water that seeps into the ground from flowing toward the river as it would absent the pumping. See *Supplemental Environmental Assessment* 5-6. The Project may then have to release additional water from storage to offset such extractions in order to maintain delivery of any given quantity of water to downstream users. Consequently, extraction of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico. See U.S. Compl. para. 14.

This Court has previously recognized that groundwater pumping that interferes with the equitable apportionment of water under an interstate compact must be counted toward a State's use of its equitable apportionment. In *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999), the State of Kansas filed a complaint against Nebraska alleging that Nebraska was violating the Republican River Compact by reducing the inflow of

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voir. See *City of El Paso* v. *Reynolds*, 563 F. Supp. 379, 382, 386 (D.N.M. 1983) (explaining that New Mexico argued that it could not allow the export of groundwater from southern New Mexico because the Compact "apportions the surface waters of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related ground water," but stating that New Mexico had previously taken the position in *Texas* v. *New Mexico*, No. 9, Original, that the Compact "does not apportion the Rio Grande between New Mexico and Texas").

water into Harlan County Reservoir—a storage facility for a reclamation project in Nebraska—through pumping of hydrologically connected groundwater in Nebraska upstream of the reservoir. The Court invited Nebraska to test its theory that groundwater pumping was not subject to the Compact in a motion to dismiss, and the Court referred the ensuing motion to a Special Master. *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999); 528 U.S. 1001 (1999). The Master recommended that Nebraska's motion be denied, concluding that "[t]o whatever extent groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be counted against the allocated share of the pumping State." See First Report of the Special Master (Subject: Nebraska's Mot. to Dismiss) 1-3, in *Kansas* v. *Nebraska*, No. 126, Original (Jan. 28, 2000); see *id.* at 34-35 ("[A] compact apportioning stream flows can restrict groundwater usage even though the term 'groundwater' is not used."). After reviewing the Master's report, the Court denied Nebraska's motion to dismiss. *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000).

Kansas v. *Nebraska* rests on the recognition that, if pumping of hydrologically connected groundwater that affects surface flow does not count toward a State's apportionment under an interstate compact, then the fundamental purpose of the compact—to equitably apportion water between States—would be frustrated. First Report of the Special Master 2-3. An upstream State could unilaterally increase its share of water by pumping hydrologically connected groundwater, thereby decreasing the amount of water that flows downstream. *Ibid.*; see also *Kansas* v.

Colorado, 514 U.S. 673, 693-694 (1995) (agreeing with Special Master's conclusion that post-compact pumping in Colorado had caused material depletions of the usable state-line flow of the Arkansas River, in violation of the Arkansas River Compact). In this case, groundwater that is hydrologically connected to the Rio Grande River and its tributaries must be included within the Compact's protection if the Compact is to ensure the effectuation of an equitable apportionment to Texas, as its preamble makes clear it is to do.

B. New Mexico's Interference With Project Deliveries To Texas, As Alleged In The Complaints, Is A Violation Of The Compact

Because Texas's receipt of its share of the equitable apportionment under the Compact is accomplished through the instrument of the Project—by Project deliveries of "[u]sable water" for irrigation purposes, Art. I(*l*), 53 Stat. 786—New Mexico's interference with Project deliveries of that water, including by drawing on seepage, return flows, and hydrologically connected groundwater, is a violation of the Compact.

New Mexico contends (Mot. to Dismiss 27-37) that its only obligation under the Compact is to deliver water to Elephant Butte Reservoir, and that "[no] term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas stateline or to prevent diversions of water after New Mexico has delivered it at Elephant Butte." *Id.* at 27-28. The United States agrees that New Mexico has no quantified state-line delivery obligation as such under the Compact. But the Compact *does* require New Mexico, downstream of Elephant Butte Reservoir, to prevent diversions of Project water and of hydrologically connected groundwater that reduce return flows

of Project water, thereby interfering with Texas's equitable apportionment.

1. It is undisputed that the Compact does not require New Mexico itself to deliver any specific amount of water to the Texas state line. New Mexico's delivery obligation is instead to deliver water to Elephant Butte Reservoir, Art. IV, 53 Stat. 788, 105 miles upstream from Texas. As the Compact Commissioner for Texas explained, a primary reason why the Compact does not impose a state-line delivery obligation on New Mexico is because "the source of supply for all lands above Fort Quitman and below Elephant Butte reservoir * * * is the reservoir itself," and New Mexico could not be expected to guarantee a specific amount of water at the state line when "the reservoir is under the control of an entirely independent agency," *i.e.*, Reclamation. Mot. to Dismiss App. 25-26. The Commissioner further explained that a state-line delivery requirement was infeasible "by reason of the irregular contour of the boundary between the two States and other physical facts," including the "practical[] impossib[ility] [of] measur[ing] the water passing the state line at the various places in the river channel and in the canals, laterals[,] and drains." *Id.* at 25.

Instead, the Compact requires New Mexico to deliver Texas's share of the equitable apportionment upstream of the state line, at Elephant Butte Reservoir, as part of the *total* amount of water New Mexico must deliver to the Project there. The Project, which had long been operating when the Compact was adopted, then delivers water to the irrigation districts for distribution to water users in New Mexico and Texas. The fact that the Compact's apportionment to Texas is effectuated through the intermediary of the

Project in no way detracts from the protection that the express terms of the Compact afford to Texas. In this respect, the result is the same as if Reclamation (or Texas) had constructed a pipeline to deliver water directly from Elephant Butte Reservoir to Texas and the Compact expressly incorporated that means of delivery of Texas's share of the water. Just as such a Compact term would prohibit New Mexico from siphoning off water from the pipeline for use by farmers in New Mexico, the Compact to which New Mexico and Texas actually agreed prohibits New Mexico from siphoning off water from the Project after it has been released from Elephant Butte Reservoir for authorized downstream deliveries, including to Texas. And if Texas were to obtain more than its share of water, New Mexico, like Texas here, could bring an action under the Compact to protect its share of the equitable apportionment.

Because Texas's apportionment is accomplished first by New Mexico's obligation to deliver water to the Project at Elephant Butte Reservoir and then through operation of the Project, New Mexico's argument that the Compact does not impose a delivery obligation on New Mexico at its border with Texas is simply beside the point. Thus, it is of no moment, as New Mexico argues, that no express term of the Compact requires a state-line delivery (Mot. to Dismiss 29-30), that the drafters knew how to include a state-line delivery requirement because they did so for Colorado at the New Mexico state line in Article III of the Compact (*id.* at 30-31), that various courts have described New Mexico's delivery obligation as being at Elephant Butte Reservoir (*id.* at 31-32), that other compacts contain state-line delivery requirements (*id.*

at 32-33),[5] and that the negotiation history of the Compact confirms that New Mexico's delivery obligation is not at the state line (*id.* at 34-36).

2. Although New Mexico does not control releases from the Project and in that respect cannot be held responsible for ensuring that any particular amount of water reaches Texas (Mot. to Dismiss 60), it hardly follows that New Mexico is free of any duty under the Compact to prevent its water users from interfering with Project deliveries by diverting Project water that Reclamation releases from the reservoir to meet irrigation demands in Texas as well as hydrologically connected groundwater. New Mexico contends (*id.* at 36-37, 61-62) that no Compact term expressly prohibits New Mexico from interfering with Project deliveries to Texas, and the complaints therefore would require the court to "read absent terms" into the Compact (*id.* at 28, 36, 62), such as an implied covenant of good faith and fair dealing, which the Court declined to recognize under the compact at issue in *Alabama* v.

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[5] The Compacts that New Mexico cites are distinguishable from the Rio Grande Compact in any event. Contrary to New Mexico's assertion, under the Pecos River Compact, most of the water to be delivered at the Texas state line is not stored in the upstream reservoir, but comes from other sources. See *Texas* v. *New Mexico*, 462 U.S. 554, 574 (1983) ("In its natural state, the Pecos actually dries up for long periods of time between Alamogordo [Dam] and the state line, so the water that crosses the state line is not the same water that passes the dam, except in periods of extreme flood."). With respect to the Arkansas River Compact, the parties separately agreed on an operating plan to divide the reservoir waters more than 30 years after the Compact was negotiated. That plan did not require Kansas to give up its claims that pumping in Colorado was diminishing the flow of the River in violation of the Compact. See *Kansas* v. *Colorado*, 514 U.S. at 691-692.

North Carolina, 560 U.S. 330, 351-352 (2010). That is incorrect. New Mexico's obligation to refrain from intercepting or interfering with Project deliveries to Texas is reflected in the Compact's express terms.[6]

Article I(*l*) of the Compact states that water delivered by New Mexico into project storage is "[u]sable water" that is "available for release [by the Project] in accordance with irrigation demands" downstream of Elephant Butte Reservoir and "for deliver[y] to Mexico." 53 Stat. 786. By diverting water below Elephant Butte Reservoir that is committed to agreed-upon purposes under the Project and the Compact, New Mexico is breaching the parties' agreement. Once New Mexico delivers water to Elephant Butte Reservoir, the State may not allow its water users (other than EBID) to take surface water from the Rio Grande, to intercept Project return flows or seepage, or to pump hydrologically connected groundwater

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[6] In *Alabama* v. *North Carolina*, Alabama had claimed that North Carolina violated an implied duty of good faith and fair dealing by withdrawing from an interstate compact, even though the compact expressly permitted withdrawal. 560 U.S. at 351-352. The Court stated that it was "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented." *Id.* at 352. The Court stated that it would not "order relief inconsistent with [the] express terms" of a compact, "no matter what the equities of the circumstances might otherwise invite." *Ibid.* (citation and internal quotation marks omitted). In *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014), however, the Court drew a distinction between invoking the covenant of good faith and fair dealing to impose on the parties obligations not affirmatively set forth in an agreement, and invoking the covenant "to effectuate the intentions of parties or to protect their reasonable expectations." *Id.* at 1431-1432 (citation omitted).

when to do so would impair the delivery of surface water and its return flows by the Project in response to irrigation demands.

New Mexico's reading of the Compact, including its view that New Mexico has no obligation to limit additional diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir (Mot. to Dismiss 40-45), is also inconsistent with the requirement in the Compact that New Mexico "deliver" a specific quantity of water to Elephant Butte Reservoir. See Art. IV, 53 Stat. 788. "Delivery" is generally understood to mean "[t]he formal act of transferring something" or "the giving or yielding possession or control of something to another." See *Black's Law Dictionary* 494 (9th ed. 2009); see also *Black's Law Dictionary* 349 (2d ed. 1910) (current edition when Compact was negotiated and signed) (defining "delivery" in the context of "conveyancing" as "[t]he final and absolute transfer of a deed * * * in such manner that it cannot be recalled by the grantor"); *Fox* v. *Young*, 91 S.W.2d 857, 859 (Tex. Civ. App. 1936) ("A delivery may be said to have been made whenever, at the time and place * * * the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer.").

As New Mexico concedes (Mot. to Dismiss 37-38, 39-40), when New Mexico "delivers" water to Elephant Butte Reservoir under the Compact, it relinquishes control of the water to the Project, as operated by Reclamation. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the re-

leased water—and for "deliver[y] to Mexico." Art. I(*l*), 53 Stat. 786.

New Mexico asserts (Mot. to Dismiss 44-45) it is significant that New Mexico's promise in the interim Compact—that it would not allow water rights above and below Elephant Butte Reservoir to "be impaired by new or increased diversion or storage within the limits of New Mexico," Art. XII, 46 Stat. 772—was not reiterated in those terms in the Compact. But because New Mexico agreed in the Compact to relinquish control over the water once it was delivered at Elephant Butte Reservoir, and because the Compact in turn apportions a share of that water to Texas through the Project, there was no need for the Compact to contain a further provision barring New Mexico from impairing vested rights below Elephant Butte Reservoir. New Mexico's agreement to relinquish control of the water at Elephant Butte Reservoir carried forward that commitment in a different manner, based on the Compact's incorporation of the Project as the means to deliver Texas's share of the water.

It is hard to imagine that Texas would have agreed to the Compact under New Mexico's contrary account of the Compact's negotiation—*i.e.*, that the omission of comparable language in the 1938 Compact constituted an affirmative authorization (by mere silence) for New Mexico to impair the "equitable apportionment" to Texas that the Compact expressly provides. It would also make little sense for the States to have given the Commissioner for Texas the authority under Article VIII of the Compact to demand that Colorado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued

debits sufficient to allow for a normal release of 790,000 acre feet per year from the Project, 53 Stat. 790, if New Mexico then could authorize depletions of the water that Reclamation releases downstream of Elephant Butte for Project uses.[7]

The complaints filed by Texas and the United States allege that New Mexico—through its water users downstream of Elephant Butte Reservoir who do not have contracts with the Secretary or who are using water not authorized by such contracts—is taking surface water from the Rio Grande and pumping hydrologically connected groundwater. U.S. Compl. para. 13; Tex. Compl. paras. 18-19.[8] Those actions are interfering with Texas's ability to receive

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[7] New Mexico's duty to protect the Project water from interference is further reflected in its 1905 and 1907 territorial laws. In requiring Reclamation to give notice of the United States' intent to utilize the Territory's water for irrigation purposes, which the United States provided in 1906 and 1908, New Mexico agreed that such water "shall not be subject to further appropriations" and that "no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory." 1905 N.M. Laws 277 (ch. 102, § 22); 1907 N.M. Laws 85-86 (ch. 49, § 40).

[8] New Mexico does not appear to contest that there have been substantial diversions of surface water and hydrologically connected groundwater in New Mexico. Indeed, in New Mexico's challenge to the 2008 Operating Agreement that effectively requires EBID to account for changes in Project efficiency caused by groundwater pumping in New Mexico, see p. 8 & n.1, *supra*, New Mexico alleges that the use of water by the Project has "drastically changed" since the 2008 Operating Agreement went into effect "in that approximately 150,000 acre-feet less per year has been delivered to New Mexico than was delivered prior to the 2008 Operating Agreement." 1:11-cv-00691 Docket entry No. 45, para. 46 (Feb. 14, 2012).

its equitable apportionment of the waters of the Rio Grande through Project deliveries. Tex. Compl. para. 18; U.S. Compl. para. 14. By intercepting water in this manner, New Mexico is in breach of its obligation under Article IV of the Compact to deliver and relinquish control of the water to the Project at Elephant Butte Reservoir, 53 Stat. 788, and its agreement that water in project storage would be used only by the Project to satisfy irrigation demands and for deliveries to Mexico, Art. I(*l*), 53 Stat. 786.

C. Texas Can Enforce Its Rights Under The Compact Through An Original Action In This Court

New Mexico nevertheless contends (Mot. to Dismiss 48-58) that "New Mexico's obligations with respect to Project water that is released below Elephant Butte arise under * * * state laws and authorities, not under the Compact" (*id.* at 59). It further contends that any complaints about New Mexico's interference with Project deliveries must be addressed through a suit brought by the United States "under New Mexico law to protect the Project right from interference by junior groundwater appropriators in New Mexico" (*id.* at 56; see *id.* at 59). Both of the premises underlying New Mexico's argument are flawed.

1. The Project is not administered solely pursuant to New Mexico state law. Section 8 of the Reclamation Act does provide that:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired

> thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

43 U.S.C. 383. But this Court has held that the application of state law under Section 8 of the Reclamation Act cannot override other specific directives of Congress. See, *e.g.*, *California* v. *United States*, 438 U.S. 645, 668 n.21, 670-679 (1978).

a. The Compact, which was approved by Congress, 53 Stat 785, is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2125 (2013); *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And in any event, the New Mexico legislature has enacted the Compact into state law, see N.M. Stat. Ann. § 72-15-23 (1997), and the Compact therefore limits New Mexico water users below Elephant Butte Reservoir from interfering with Project deliveries to Texas for irrigation as a matter of state law as well.

A State may adjust the rights of its citizens by entering into an interstate compact with the consent of Congress. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment of water in an interstate stream pursuant to a compact "is binding upon the citizens of each State and all water claimants"). Accordingly, even if New Mexico state law would permit New Mexico water users to pump groundwater that is hydrologically connected to the Rio Grande (see pp. 14-15, *supra* (summarizing New Mexico state trial court's decision that the Project's water right does not include "groundwater")), they are prohibited from doing so if the pumping interferes with the ability of Texas to

receive its Compact apportionment in the form of deliveries of Project water for irrigation, including seepage and return flows, as New Mexico agreed to in the Compact. See Art. I(k) and (*l*), 53 Stat. 786.

b. New Mexico's interference with Project deliveries is also contrary to federal reclamation law, which has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project. See §§ 4-5, 32 Stat. 389 (43 U.S.C. 431, 439, 461); §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e); see also 43 U.S.C. 485h(c), (d) and (e).[9] The requirement of a contract for project water extends to seepage and return flows, which belong to Reclamation. See *Ide* v. *United States*, 263 U.S. 497, 505 (1924) (holding that a federal reclamation project is entitled to seepage water for irrigation purposes). That holding has been specifically applied to the Rio Grande Project. See *Bean* v. *United States*, 163 F. Supp. 838, 845 (Ct. Cl.) (citing *Ide* and holding that "[t]here can be no doubt * * * that the Reclamation Bureau, under its appropriations of 1906 and 1908, had the control and the right to prescribe the use of the seepage from lands within the project, as well as the original use of the waters"), cert. denied, 358 U.S. 906 (1958); see also *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1775-1777 (2011) (quoting *Ide* and

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[9] Under the Reclamation Act, contracts with the Secretary were formed through petitions filed by individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

describing the doctrine of recapture, pursuant to which an appropriator is entitled to the "exclusive control [of his appropriated water] so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation") (citation omitted; brackets in original).

Other federal courts have similarly described a reclamation project's right to control the disposal of seepage and return flows from project deliveries. In *Israel* v. *Morton*, 549 F.2d 128 (1977), the Ninth Circuit explained:

> Project water * * * would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.

Id. at 132-133. The premise that "[p]roject water * * * would not exist but for the fact that it has been developed by the United States," is particularly clear in the Rio Grande Basin, because all but a very small portion of whatever water there is downstream of Elephant Butte Reservoir can be traced back to the Project. Tributaries between Elephant Butte Reservoir and Fort Quitman "consist only of arroyos, dry most of the time but subject to flashy floods," and there is no significant tributary inflow downstream of Caballo Reservoir. *Joint Investigation* 23.

In *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133 (2009), the Tenth Circuit explained:

> From the very beginning of the reclamation program, Congress has restricted the use of water released from reclamation projects, and these restrictions are exceptions to the general rule embodied in 43 U.S.C. [] 383 that state law governs the control, appropriation, use, and distribution of reclamation water * * * Federal law recognizes that a change in the use of project water from irrigation to municipal and industrial use * * * requires a contract with the Secretary.

Id. at 1148 (citations omitted). Accordingly, once water is delivered to Elephant Butte Reservoir by New Mexico, water users below the reservoir cannot take water, including return flows and water that has seeped into the ground, except as authorized by a contract with the United States.[10]

c. New Mexico's authority to regulate water below Elephant Butte Reservoir is also subject to the United States' obligation to deliver 60,000 acre feet of water per year to Mexico for irrigation, pursuant to the 1906 treaty. As the United States alleged in its complaint, "[u]ncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where * * * 60,000 acre-feet per year could not be delivered to Mexico." U.S. Compl. para. 15.

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[10] New Mexico contends (Mot. to Dismiss 51 n.6) that state law governs return flows and seepage from reclamation projects. The only authority New Mexico cites for that proposition is a Reclamation policy manual, but that manual states that "Reclamation will assert and protect its interest in return flows either under state law *or as Federal property*." Mot. to Dismiss. App. 2 (emphasis added).

The treaty is another specific directive of Congress that supersedes the application of state water law contained in Section 8 of the Reclamation Act. See *Missouri* v. *Holland*, 252 U.S. 416, 434-435 (1920) ("Valid treaties of course are * * * binding within the territorial limits of the States.") (citation and internal quotation marks omitted); *Kolovrat* v. *Oregon*, 366 U.S. 187, 198 (1961) ("After the proper [federal] governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon of course cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities.").

New Mexico has not asserted that state regulation of the Project's water right could be applied in a manner that would deprive Mexico of 60,000 acre feet of water per year. There is no logical basis for distinguishing between the State's obligation to administer state law in a manner that respects the treaty rights of Mexico, and its obligation to administer state law in a manner that respects the Compact's equitable apportionment of water between New Mexico and Texas.

2. Because the Project's right to water below Elephant Butte Reservoir must be administered in accordance with the Compact, Texas properly brought this original action to protect its Compact apportionment. To conclude otherwise would be to hold that Texas has no apportionment of water under the Compact that it can enforce. In any event, New Mexico's contention (Mot. to Dismiss 56-58) that Reclamation "has effective tools available under New Mexico law to protect the Project right from interference" is unpersuasive.

New Mexico suggests (Mot. to Dismiss 56-57) that the United States can protect the Project's water right by making a priority call on the river under New Mexico law. According to New Mexico, "[a] senior surface water user such as the Project can make a priority call against a junior groundwater user in the same basin if the groundwater use is interfering with the surface water right." *Id.* at 57. New Mexico further states that the New Mexico State Engineer has the authority to administer water rights where, as here, "a final adjudication of the rights in a given basin has not been completed." *Ibid.* Those state-law mechanisms are inadequate to protect Texas's Compact apportionment for several reasons.

First, "[a] State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia* v. *Sims*, 341 U.S. 22, 28 (1951). Without this Court's protection of Texas's equitable apportionment under the Compact, New Mexico would not be constrained by anything other than its own interpretation of state law from allowing Texas's allocation of Project water from Elephant Butte Reservoir to be diminished based on an asserted state-law right of New Mexico water users to pump hydrologically connected groundwater. There is no justifiable reason why Texas's Compact apportionment must be defined by the New Mexico State Engineer, and in a suit brought by someone other than Texas. And it defies common sense to suggest that Texas agreed to have its equitable apportionment under an interstate compact—an Act of Congress prescribing a rule of *federal* law—to be defined by the *state* law of an upstream State.

Second, the Project right that New Mexico contends the United States can enforce through state

proceedings does *not* include a right to deliver water to Texas under the Compact. The United States requested that the New Mexico court recognize that the Project is entitled to up to 376,000 acre feet of water per year for delivery to Texas, in recognition of a decree from a Texas water adjudication defining the Project's water right in Texas. See p. 16, *supra*. The New Mexico court concluded, however, that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." 2/17/14 Order 4. But once this Court defines Texas's equitable apportionment under the Compact—and in the process defines the protection from interference the Compact affords more generally to all of the water delivered to and released from the Project—the New Mexico court can determine water rights in the New Mexico portion of the Rio Grande Basin with proper regard for the Compact and Texas's share of the water apportioned by the Compact.

Third, the process that New Mexico describes would be futile as a means to protect Texas's Compact apportionment. As described above, pp. 14-15, *supra*, the New Mexico court has concluded in the water adjudication that the Project's water right is a surface right that does not include "groundwater." According to the state court, when surface water "reaches an underground reservoir and thereby loses its identity as surface water," "through percolation, seepage[,] or otherwise," it becomes public water that is subject to appropriation as "groundwater" under New Mexico law. 8/16/12 Order 7 (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)).

The state-law doctrine that New Mexico invoked in the state adjudication to strip the Project of essential protection for seepage and return flows is based on New Mexico's interpretation of *Kelley*. In *Kelley*, the New Mexico Supreme Court held that, when surface water has "been lost to the underground reservoir," a person having a surface water right "can neither transfer his surface right nor change his point of diversion to the underground reservoir." *Id.* at 853. The United States strongly disputes the proposition that Project water that has seeped into the ground and become susceptible to pumping in New Mexico has "lost its identity" as Project return flows. Indeed, for decades before *Kelley* was decided the Project was using return flows that are hydrologically connected to such groundwater. And, as discussed above, New Mexico's interpretation of state law cannot override federal reclamation law or New Mexico's agreement in the Compact to relinquish to the Project control over the water the State delivers at Elephant Butte Reservoir, which the Project then delivers downstream for irrigation purposes and to Mexico.

Moreover, the New Mexico State Engineer has offered two major groundwater pumpers downstream of Elephant Butte Reservoir priority dates that are senior to the priority date offered to the United States.[11] To the extent that those groundwater pumpers are permitted under New Mexico state law to pump water that comes from or supports Project deliveries, New Mexico's assurance that the United States may use state

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[11] For most of its groundwater right, New Mexico State University has been offered a priority date of 1890, and the City of Las Cruces has been offered a priority date of 1905. See Docket entry (Mar. 9, 2007); Docket entry (Aug. 31, 2005).

proceedings to prevent "*junior* appropriators in New Mexico [from] interfering with Project water rights" (Mot. to Dismiss 62 (emphasis added)) is not sufficient to protect the Project and Texas's Compact apportionment.

3. Finally, New Mexico contends (Mot. to Dismiss 39 (citation omitted)) that Article XI of the Compact "defines and limits the scope of Texas' recourse against New Mexico" and provides that Texas has recourse under the Compact only to remedy "a failure [by New Mexico] to perform 'at the point of delivery,'" *i.e.*, at Elephant Butte Reservoir. That is incorrect.

Article XI provides that "New Mexico and Texas agree that upon the effective date of th[e] Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing [in the Compact] shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 791.

Article XI does not limit the scope of the parties' remedies for violations of the Compact to complaints that one State has changed the "character or quality of the water[] at the point of delivery." That language clarifies one type of claim that the parties specifically agreed could be brought under the Compact, which might not otherwise have been clear from the Compact's terms. But it does not eliminate claims based on other violations of the Compact. The most obvious potential violations of the Compact—a failure by Colorado to deliver the required *amount* of water to the

New Mexico state line, or a failure by New Mexico to deliver the required *amount* of water to Elephant Butte Reservoir—would not be remediable under New Mexico's view of Article XI because those breaches of the Compact would not be changes to the "character or quality of the water" at the point of delivery.

Furthermore, even if Article XI limited each State's remedies under the Compact to complaints that another State had changed the character or quality of water at the point of delivery, the Compact does not define "character," and the disjunctive "or" in the phrase "character or quality" of water suggests that "character" refers to something other than water quality. The term could refer, for example, to the possessory status of the water, and New Mexico could be said to have changed the character of the water at the point of delivery by preventing the Project from exercising full control over the water after New Mexico makes that delivery.

II. EVEN IF THE COURT CONCLUDES THAT TEXAS HAS NOT STATED A CLAIM UNDER THE COMPACT, THE COURT SHOULD NOT DISMISS THE UNITED STATES' COMPLAINT

Even if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the Project, the United States' complaint in intervention should nevertheless go forward. Although the United States' complaint against New Mexico does not fall within the Court's *exclusive* original jurisdiction, the Court nevertheless has original jurisdiction over controversies between the United States and a State. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(2).

Exercise of that jurisdiction in this case would be appropriate.

The United States has a claim under the Compact because the Compact incorporates the Project and designates the "[u]sable water" in project storage as water that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and the United States has a right protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands.

The Compact also protects the United States' ability to deliver water to Mexico pursuant to the 1906 treaty. The treaty specifically describes that water will be delivered to Mexico from the Project, see Art. I, 34 Stat. 2953-2954, and the Compact specifically protects the Project's right to deliver water from the Project to Mexico. Art. I(*l*), 53 Stat. 786.

Because the Project's rights under the Compact include allocating water between two States and delivering water to a foreign country, the United States' claims do not involve "competing claims to water within a single State," over which the Court has previously declined to exercise its original jurisdiction. See Mot. to Dismiss 64 (citing *United States* v. *Nevada & California*, 412 U.S. 534, 538 (1973)). New Mexico's view (*ibid.*) that this case is appropriately resolved "in a New Mexico court" should be rejected. The importance of this case to each of the sovereigns involved is such that the Court should exercise its original jurisdiction over the United States' complaint,

even if it concludes that Texas does not have an enforceable right to water deliveries under the Compact.

CONCLUSION

New Mexico's motion to dismiss Texas's complaint and the United States' complaint in intervention should be denied.

Respectfully submitted.

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JUNE 2014

COPY 2-16-38

CONTRACT

This contract made and entered into by and between the Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas, pursuant to resolutions of the Board of Directors of the respective Districts, authorizing the same, WITNESSETH THAT:

WHEREAS, it is expedient that the acreage within each irrigation District which is to be irrigated should be cushioned by allowing the distribution of water to a small excess of acreage over and above that allotted to the two Districts under the Rio Grande New Mexico-Texas Reclamation Project, to the end that annual variations, within narrow limits, shall be permitted, and so that, each year, there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres upon which construction and operation and maintenance charges may be levied;

THEREFORE, it is mutually agreed that either District may increase the acreage to be irrigated and to be subject to construction charges, not to exceed three (3%) per cent of the present authorized acreage in each District, that is to say, Elephant Butte Irrigation District, having authorized acreage of 88,000 acres, may increase such acreage to the extent of three (3%) per cent thereof, amounting to not to exceed 2,640 acres; that El Paso County Water Improvement District No. 1, having a present authorized acreage of 67,000

acres, may increase such acreage to three (3%) per cent thereof, that is, not to exceed 2,010 acres, said additional lands, in any case, to be within the limits of the present irrigation Districts or any future extensions thereof.

It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

It is further agreed and understood that the operation and maintenance costs of the project works (exclusive of the storage and power development) for the calendar year of 1938 and thereafter shall be distributed between the two Districts in the same manner as similar costs were distributed for the calendar year 1937, and that the same ratios for the two Districts, respectively, that were applied to said costs for that year common to both Districts shall be used in 1938 and subsequent years.

This contract to be effective only during the period when the proposed contracts under Public No. 249, Seventy-fifth Congress, 1st Session, between, (1) the United States and Elephant Butte Irrigation District and (2) the United States and El Paso County Water Improvement District No. 1 are in force, and if either or both of said contracts should terminate after both have becom effective, this contract is also to terminate.

IN TESTIMONY WHEREOF, the parties hereunto have caused the same to be signed by the Presidents of their respective Boards of Directors, and attested by the Secretary with the seal of said corporation, this 16th day of February A.D. 1938.

THE ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO.

By (Signed) Arthur Starr
President

(SEAL)

ATTEST: (Signed) Jose R. Lucero
Secretary, Elephant Butte
Irrigation District.

EL PASO COUNTRY WATER IMPROVEMENT DISTRICT DISTRICT NO. 1 OF TEXAS

By (Signed) T.D. Porcher
President

(SEAL)

ATTEST: (Signed) Idus T. Gillett
Secretary, El Paso County Water
Improvement District No. 1.

APPROVED THIS 11TH DAY OF APR., A.D. 1938

(Signed) Oscar L. Chapman
ASSISTANT SECRETARY
OF THE INTERIOR

RECORD AND BRIEFS

No. 141, Original

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

ON MOTION TO DISMISS

NEW MEXICO'S REPLY BRIEF

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REPLY BRIEF OF THE STATE OF NEW MEXICO

The State of New Mexico files this Reply Brief in response to the briefs filed by the State of Texas and the United States ("Tex. Br." and "U.S. Br.") on New Mexico's Motion to Dismiss ("N.M. Br.").

INTRODUCTION

The Motion to Dismiss should be granted because there is no Rio Grande Compact ("Compact") claim either for Texas or the United States below the Elephant Butte Dam ("Elephant Butte"). In the response briefs, Texas and the United States deny they are claiming a stateline delivery, but their claims necessarily are based on this premise. While the Compact imposes a delivery obligation on New Mexico at Elephant Butte, it imposes no obligation on New Mexico below Elephant Butte. This is confirmed by the course of conduct of the parties through Compact accounting, which for the last 75 years has never extended into the irrigated areas of the Rio Grande Project ("Project"). The compacting States and Congress were well aware of the extant protections and corresponding obligations under federal and state law regarding the Project and chose not to add additional obligations. To add such obligations into the Compact, as Texas and the United States suggest,

would disregard the Court's rule that additional duties cannot be implied in interstate compacts.

The United States and Texas also inexplicably complain about two undisputed propositions: that the Project is entitled to reuse return flows and that only holders of Reclamation contracts may receive deliveries of Project water. As to the first proposition, in fact, New Mexico has long supported the United States' claim to reuse of return flows in the ongoing state adjudication, and the New Mexico Lower Rio Grande adjudication court ("LRG Adjudication Court") has already ruled that the United States may reuse its Project return flows. As to the second proposition, the United States and the Project irrigation districts control Project deliveries. However, Las Cruces, the second largest city in New Mexico, relies on groundwater for its primary municipal supply, and over one thousand farmers in New Mexico in the Lower Rio Grande have perfected supplemental groundwater rights from the public aquifer under New Mexico state law. These water rights owners cannot now be forced to obtain contracts from the United States simply to continue using their state-based water rights, as the United States implied in its Complaint. The United States filed its claims to water rights in the Project in 2010 and did not claim groundwater before it has returned to the river or a drain as a source of Project supply. It has no claim to and no jurisdiction over groundwater in New Mexico. If the uses of state groundwater rights are impairing delivery of Project water, the United States need avail itself of the remedies under the Reclamation Act and

the state law incorporated therein. The detailed technical process of restricting other water uses under the prior appropriation system, if needed to protect the Project water uses, is best addressed in the first instance by the state institutions charged with that responsibility. As the Court has previously ruled, it is preferable to rely on such state remedies in the first instance, subject to the Court's oversight.

Finally, upon dismissal of the Texas Complaint, the United States Complaint in Intervention should also be dismissed. There is no precedent allowing an Intervenor-Plaintiff to continue its own claims when the initial Complaint is dismissed. The United States is not a party to the Compact, and its Complaint is based solely on this Court's original exclusive jurisdiction over controversies between states. To allow an independent Compact claim by the United States against a State under an interstate water compact under these circumstances would be unprecedented and contrary to this Court's rulings regarding interstate water compacts and their enforceability.

ARGUMENT

I. New Mexico Recognizes and Meets Its Compact Obligations

New Mexico honors its Compact obligations. Neither Texas nor the United States allege that New Mexico has failed to comply with the explicit delivery obligations in Article IV of the Compact. Instead, they

suggest that the Compact contains an implied duty to restrict uses of non-Compact waters below the Compact delivery point. Tex. Br. 22-23.

New Mexico does not suggest that the Compact allows it to "simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas," as Texas claims, Tex. Br. 28, and it does not argue that it is free from responsibility below Elephant Butte. Rather, as New Mexico explained in its opening brief, under Article IV of the Compact, New Mexico satisfies its obligations to Texas by delivering water to Elephant Butte. Once delivered there, New Mexico's obligations below Elephant Butte arise under Reclamation law and the doctrine of prior appropriation, and that doctrine provides the Project right protection from impairment. N.M. Br. 49-52. Because New Mexico does not contend that the Compact allows it to deplete Project flows below Elephant Butte, the arguments of Texas and the United States which seek to refute that position, including those that relate to Compact credits and debits, Tex. Br. 31-33, the Preamble, Tex. Br. 25-30, U.S. Br. 26-33, and Reclamation contracts, Tex. Br. 41-45, U.S. Br. 43-45, are of no import.

The responsive briefing makes clear that there is much on which New Mexico, Texas, and the United States agree. All three parties understand that the States "utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it." Tex. Br. 28. The parties also agree that the Compact

does not impose a stateline delivery requirement, Tex. Br. 22, U.S. Br. 34, and does not ensure "that any particular amount of water reaches Texas." U.S. Br. 36.

The key difference between the two positions is the source of the protection afforded to Project deliveries: New Mexico asserts that the Compacting States relied on extant Reclamation law to protect the Project, and therefore Compact, deliveries; Texas and the United States argue that the Compact silently modified Reclamation law to impose an implied but affirmative duty on New Mexico to shepherd water from Elephant Butte to the Texas stateline. The distinction is important. The Compact requires New Mexico to deliver water *to* Elephant Butte – indeed it places Texas' right of enforcement there. But it does not include an implied duty for New Mexico to deliver water to the stateline. Therefore, the Texas Complaint and the United States Complaint in Intervention should be dismissed.

II. Deliveries From Elephant Butte to Texas Are Protected By Reclamation Law

A. The Compact Is Silent on Any New Mexico Obligation Below Elephant Butte

Both Texas and the United States now concede that the Compact imposes no stateline delivery requirement. *See* Tex. Br. 2, 22; U.S. Br. 22, 34. Nevertheless the United States asserts that "New Mexico

does have a duty under the Compact to prevent its water users from diverting Project water that Reclamation releases from the reservoir." U.S. Br. 22-23. This is, of course, just a different way of alleging a right to an amount certain at the stateline. In essence, the United States and Texas are seeking to impose a stateline obligation on New Mexico, contrary to the express wording of the Compact.

The Compact did not divide Project waters between New Mexico and Texas lands. That had already been done by the Project, which was in full operation at the time the Compact was executed. Rather, the Compact apportioned the waters of the Rio Grande Basin, from its headwaters to Fort Quitman, among Colorado, New Mexico and Texas by imposing delivery requirements at the Colorado-New Mexico stateline for Colorado and at Elephant Butte for New Mexico. Clearly, an important purpose of this apportionment was to protect inflows of Project water into Elephant Butte from upstream depletions by New Mexico and Colorado. *See* Compact, Arts. III, IV. But the Compact included no requirement of New Mexico below Elephant Butte because the parties understood that existing Reclamation law, which incorporated New Mexico state law, provided effective protection for Texas' water. *See* N.M. Br. App. 32.[1] The

[1] Texas' objection to New Mexico's reliance on extrinsic sources in its brief in support of its motion to dismiss is unfounded. As the Court explained in *Oklahoma v. New Mexico*, "it is appropriate to look to the extrinsic evidence of the negotiation history of [a] Compact" to interpret its provisions. 501 U.S. 221, 234 n.5

(Continued on following page)

most logical explanation for the silence is the parties' assumption that no additional protection of Project water was necessary beyond that already provided by federal and state law.

If additional remedies for injurious depletion of Project water destined for Texas lands had been considered necessary, the drafters could have expressly provided them. Or they could have been implicitly provided by imposing a stateline delivery obligation. The parties did neither. Other compacts expressly include such terms, including the 1929 Temporary Compact, so the drafters certainly knew how to craft them if that was their intent. The absence of such terms is significant.

The Court has said that it will not read into a compact terms that are not expressly included. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different." (citations omitted)). Indeed, in *Texas v. New Mexico*, 462 U.S. 554 (1983), when the Special Master, with the support of

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(1991). Consistent with this principle, the Court has accepted motions to dismiss in other interstate compact cases that append and reference extrinsic sources. *E.g.*, Wyoming's Motion to Dismiss, *Montana v. Wyoming*, No. 137, Orig. (April 1, 2008) (appending 95 pages of extrinsic materials, including letters from compact commissioners). Moreover, Texas cites to a number of extrinsic sources in its response to New Mexico's Motion to Dismiss. Tex. Br. xi.

Texas, recommended that this Court add a provision to the Pecos River Compact, the Court rejected that proposal, saying that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.* at 564. The Court should reject Texas' and the United States' position because it is inconsistent with that ruling and with the ruling of the Court in *Alabama v. North Carolina*.

B. Deliveries to Texas Beneficiaries Are Protected by Reclamation Law

1. All of the parties acknowledge the central role that the Project plays in delivering water to Texas. Texas has further recognized that "[t]he delivery of Texas' apportioned water under the Compact cannot occur without the Rio Grande Project." Tex. Br. 7-8. The United States has similarly recognized that Texas receives its apportionment of water under the Compact through deliveries from the Project. U.S. Br. 26-33. In its opening brief, New Mexico explained that it satisfies its Compact obligations upon delivering water to Elephant Butte, and that once water is delivered to the Project, Reclamation distributes it to downstream users in New Mexico and Texas pursuant to Reclamation law, which incorporates state law and administration. N.M. Br. 27-40, 59-63.

2. Texas and the United States improperly presume that the Compact overrides the mandate in the Reclamation Act of 1902 that Reclamation shall

"defer to the substance, as well as the form, of state water law" in the control, appropriation, *use, and distribution of* water. *California v. United States*, 438 U.S. 645, 674-75 (1978); *see also Kansas v. Colorado*, 206 U.S. 46 (1907) (explaining that Section 8 was key to passage of the Reclamation Act); Tex. Br. 58-59; U.S. Br. 41-46. That key mandate of the Reclamation Act was equally applicable to Congress' authorization of the Rio Grande Project only three years later. Act of February 25, 1905, Pub. L. No. 58-108, ch. 798, 33 Stat. 814 (extending the provisions of the Reclamation Act for purposes of building a federal project on the Rio Grande).

After initially conceding that Reclamation law applies to the operation of the Project, Tex. Br. 41, Texas takes the inconsistent position that the Compact overrides Reclamation law, Tex. Br. 58-59. Indeed, both Texas and the United States assume that the Compact irreconcilably displaces state law governing the delivery of water from the Project. Tex. Br. 58-59; U.S. Br. 47. But neither identifies a specific provision of the Compact that conflicts with Reclamation law. In effect, Texas and the United States argue that the Rio Grande Compact impliedly overrides Congress's command in the Reclamation Act to defer to state law. The Court has emphasized, however, that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation and internal punctuation

omitted). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (citation and internal quotation marks omitted); *accord United States v. Cal. Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982) ("[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme"). Texas and the United States make no effort to show that the Compact and the Reclamation Act's command to follow state law are "irreconcilable."[2]

Far from "irreconcilable," the Rio Grande Project Act and Rio Grande Compact are inextricably intertwined and interdependent, as Texas and the United

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[2] The LRG Adjudication Court has ruled that state law and Reclamation law do not conflict. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Aug. 16, 2012) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/. The United States District Court for the Western District of Texas also found New Mexico law to be consistent with Reclamation law and, therefore, not prrempted in *El Paso County Water Improvement District No. 1 v. City of El Paso*, 133 F. Supp. 894, 903-08 (W.D. Tex. 1955), *affirmed as modified*, 243 F.2d 927 (5th Cir. 1957).

States have acknowledged. Tex. Br. 7-8, 41 (arguing that the "legal framework" below Elephant Butte is defined by Reclamation law); U.S. Br. 52 ("[T]he Compact incorporates the Project"); *accord Colo. River Water Conservation Dist.*, 424 U.S. at 809 (explaining that for federal water projects, "[t]here is no irreconcilability in the existence of concurrent state and federal judisdiction"). In Texas' words, the "existence and operation of the Rio Grande Project . . . and reclamation law governing federal reclamation projects" forms the "background understanding" on the basis of which the Compact was drafted and executed. Tex. Br. 35-36 (*citing Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013); *New Jersey v. New York*, 523 U.S. 767, 783-84 & n.6 (1998)). It is implausible to assume, as Texas and the United States do, that the Compact was intended to sweep aside the very "background understanding" on which it was based. In short, the Compact does not disturb the bedrock principle of Reclamation law that state law governs the scope and administration of the Project right.

3. As noted above, New Mexico does not argue that Reclamation law allows New Mexico to deplete Project flows, including water intended for Texas or Mexico, as Texas and the United States contend. Tex. Br. 11; U.S. Br. 46. Rather, Reclamation and New Mexico law, applicable to the Project, protect the Project water delivered to Texas under the doctrine

of prior appropriation.[3] *United States v. City of Las Cruces*, 289 F.3d 1170, 1176-77 (10th Cir. 2002); N.M. Br. 56-58. The *sine qua non* of the prior appropriation doctrine is the protection of existing rights. Once water is stored in the Project in amounts determined by the Compact, it becomes Project water, and no other user is legally permitted to impair that right. Reclamation law thereby provides protection for interstate delivery from impairment by other New Mexico water users.

a. As the United States acknowledges, "New Mexico does not control releases from the Project" and therefore "cannot be held responsible for ensuring that any particular amount of water reaches Texas." U.S. Br. 36. While this does not mean that New Mexico "is free of any duty," Congress has mandated that the United States follow the prior appropriation doctrine by informing New Mexico when deliveries are not reaching their intended beneficiaries. *See Worley v. U.S. Borax & Chem. Co.*, 428 P.2d 651, 654-55 (N.M. 1967).

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[3] New Mexico law and the Reclamation Act are in complete accord. *Compare* 43 U.S.C. § 372 ("The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."), *with* N.M. Const., art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.").

Reclamation follows this practice to protect Project rights in other western states that follow the doctrine of prior appropriation. For example, in the Klamath River Basin, a river that is subject to an interstate Compact between Oregon and California, Act of August 30, 1957, 71 Stat. 497, the United States recently made a priority call to the State of Oregon Water Resources Department to regulate other water users for the benefit of the Klamath Reclamation Project. *See* Or. Water Res. Dep't, *Klamath Regulation Update*, www.oregon.gov/OWRD/pages/Klamath_Regulation_Update.aspx (last visited June 26, 2014).

b. Texas and the United States do not dispute that the prior appropriation doctrine is effective at protecting properly defined existing rights from impairment. It is therefore significant that neither alleges that the United States made a priority call or otherwise requested that New Mexico take action. Had such a communication been made, it would have informed New Mexico of the problem and triggered New Mexico's obligation *under the prior appropriation doctrine* to protect the Project right. Whether or not such a communication was made, however, *the Compact* does not impose an affirmative duty on New Mexico to marshal Project water to the stateline. New Mexico's duty to Texas is to deliver water to Elephant Butte, and it is there that Texas' right of enforcing the Compact lies. Arts. IV, XI. Texas' and the United States' claims should be dismissed.

C. Texas' and the United States' Interpretation of the Compact Violates New Mexico's Sovereignty and the Court's Established Principles of Interstate Compact Interpretation

1. Texas and the United States argue that the presumption that states do not cede their sovereignty silently does not apply here because New Mexico agreed to "deliver" water to the Rio Grande Project for distribution thereafter by Reclamation. Tex. Br. 19. But delivering water for Project distribution is not a relinquishment of sovereignty.

Texas' and the United States' strained reading of the Compact assigns too much weight to the term "deliver," deriving therefrom meanings that conflict with the drafters' understanding of the legal and factual background existing when the Compact was signed. New Mexico agrees that Article IV requires it to "deliver" water to Elephant Butte according to the Compact terms, that is, New Mexico must ensure sufficient water reaches Elephant Butte according to Article IV's delivery schedule. New Mexico further agrees that, upon delivery at Elephant Butte, the United States may distribute or otherwise use Project water consistent with the scope of its water right, as defined by state and federal law, and its contracts with Project beneficiaries.

Texas' and the United States' reading of the Compact, however, transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of

New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act. As the parties to the Compact understood at the time of its ratification, Reclamation law provided the explanation for how the distribution of water would work after New Mexico met its obligations to deliver water to Elephant Butte. And Reclamation law has always incorporated state law remedies and the doctrine of prior appropriation as its means of operation. In *California v. United States*, this Court explained that Section 8 does not allow "the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law." 438 U.S. at 675. Rather, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law. . . . [T]he control of waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.'" *Id.* at 667 (internal quotation marks and citation omitted). As explained in more detail above, nothing in the Compact or any Congressional directive overrides this bedrock principle of Reclamation law.

2. Texas' and the United States' reading of the Compact rests on a theory of compact interpretation this Court recently rejected in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. at 2133. In that case, the Court considered the argument that the Red River Compact implicitly allowed signatory

states to appropriate water without regard to state borders, preempting Oklahoma laws prohibiting the export of water out of state. *Id.* at 2130-31.

The Court disagreed, reasoning that the Red River Compact's silence on the effect of state borders at best created an ambiguity that was appropriately resolved by reference to other interpretive tools, in particular "the well-established principle that States do not easily cede their sovereign powers," the treatment of cross-border rights in other compacts, and the parties' course of dealing. *Id.* at 2132. Regarding the first principle, the Court noted that "we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty.'" *Id.* (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). Accordingly, "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" *Id.* (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)).

Given these principles, the Court refused to infer that the Red River Compact silently granted the signatory states the right to cross one another's borders to appropriate water. *Id.* at 2133. "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Id.* Instead, the

Court held that the Red River Compact's silence supported the understanding "that the parties drafted the [Red River] Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the [Red River] Compact." *Id.*

Just as was argued in *Tarrant Regional Water District*, Texas and the United States here assert an interpretation of the Compact that stretches the plain language far beyond its ordinary meaning to reach a result at odds with settled principles of compact interpretation. If the parties to the Compact had truly intended that New Mexico give up an "essential attribute of [its] sovereignty" over the public waters of southern New Mexico by agreeing to the Compact, the Compact would contain "a clear indication of such devolution, not inscrutable silence" or an agreement merely to "deliver" water. *Id.* at 2132-33.

3. The better reading of the Compact, and Article IV, is that the parties drafted the Compact with the understanding not only that states do not easily or implicitly cede their sovereignty, but also that New Mexico's Compact obligation is to deliver Texas' water to Elephant Butte, and distribution to project beneficiaries thereafter was satisfactorily regulated and protected by existing state and federal laws. *See id.* at 2133. At the time the Compact was signed, the Project had been operating as a unit for over twenty years. *See* Nat'l Res. Comm., *Regional Planning, Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New*

Mexico, and Texas, 1936-1937 at 8 (1938) ("Joint Investigation"). During this time, the Project operated under and was protected by Reclamation law. Reclamation appropriated water for the Project under state law, consistent with Section 8 of the Reclamation Act and New Mexico territorial law. N.M. Br. 5-6. Reclamation then executed contracts with Project beneficiaries pursuant to Reclamation law and proceeded to distribute Project water to these beneficiaries in accordance with these laws and contracts. *See* Joint Investigation at 8.

The Project operated under this legal regime for many years prior to the Compact's execution. Where a Compact "is silent on the subject of settled law" governing a matter, as here, the Court presumes "the parties' silence showed no intent to modify" this existing law. *New Jersey v. New York*, 523 U.S. at 783 & n.6 (holding boundary compact's silence regarding expansion of Ellis Island by landfilling indicated the parties intended the common law of avulsion to determine jurisdiction over the new land). The legal regime governing the Project was well understood at the time the Compact was executed, and the Compact does not expressly or implicitly modify this regime.

The correspondence among the drafters confirms they had no intent to eliminate the preexisting legal regime and nullify New Mexico's prior and undisputed jurisdiction over the Lower Rio Grande in New Mexico. *See* Letter from Frank B. Clayton, Compact Commissioner for Texas, to Sawnie B. Smith, attorney for the Water Conservation Association of the Lower Rio Grande (Oct. 4, 1938), N.M. Br. App. 32

(explaining that "the question of the division of the water released from Elephant Butte Reservoir is taken care of by contracts between the districts . . . and the Bureau of Reclamation" and "it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact"). As in *Tarrant Regional Water District* and *New Jersey v. New York*, the Compact's silence regarding the Lower Rio Grande, as well as its silence concerning New Mexico's jurisdiction over this area, shows that the drafters did not intend to alter the preexisting legal regime and instead relied on preexisting laws to protect Project water after the Compact's execution. The lack of any new obligations below Elephant Butte in the Compact confirms this intent.

4. The course of dealing of the signatories to the Compact and the United States also confirms that the parties understand the Compact to leave each state with the sovereign authority to regulate the use of the waters within its own borders. Texas, for example, regulates the Rio Grande including Project waters within its own borders to the extent its laws are consistent with Reclamation prior appropriation doctrine. *See In re: Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, Cause No. 2006-3219 (327th Dist. Ct. El Paso Cnty., Tex. 2006), *decree issued* Oct. 30, 2006 (adjudicating the Project right for the Texas portion). Texas' behavior demonstrates its understanding that the Compact permits the signatories to regulate Project water within their borders to the extent

consistent with state and federal law. Likewise, the United States' long-standing policy and practice is to comply with state law. It filed its notices of appropriation with the Territory of New Mexico in 1906 and 1908 for the Project, and in 2010 it filed its statement of claim (which does not claim groundwater) in the current adjudication.[4]

It is hard to imagine that New Mexico would have assented to the Compact if the interpretation Texas and the United States assert – that the Compact deprives New Mexico of jurisdiction over the use of water in the Southern part of the state – were correct. This reading of the Compact conflicts with the express terms of the Compact, established principles of Compact interpretation, and the parties' course of dealing.

D. Texas and the United States Improperly Seek to Litigate the Scope of the Project Right in This Original Action

Texas and the United States incorrectly contend that the LRG Adjudication Court is not the proper forum to define the scope of the Project right. U.S. Br.

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[4] United States Statement of Claim for Water for the Rio Grande Project, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Sept. 15, 2010) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/14-us-statement-claim-for-water-for-the-rio-grande-project.pdf.

47. The adjudication is the process by which water rights in New Mexico are defined, and as previously explained, Congress deferred to state law for adjudicating the water rights of federal Reclamation projects. *See* 43 U.S.C. §§ 372, 666. According to Texas and the United States, this Court should ignore the LRG Adjudication Court and itself determine the contours of that state-based water right. Their argument is unpersuasive for three reasons.

1. In arguing that the LRG Adjudication Court is an improper forum to determine the scope of the Project right, Texas and the United States raise the specter of bias and unfair rulings. But there is no indication that the rulings of the LRG Adjudication Court are inconsistent with the Compact. For example, in a recent order, the LRG Adjudication Court confirmed the United States' right to a maximum storage capacity, annual release, and ability to divert as it has done historically, including full use of return flows (to which New Mexico agreed) in harmony with the Compact. Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference at 2-5, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Feb. 17, 2014) (N.M. Dist. Ct.) ("LRG Adjudication Summary Judgment Order" at 2-5), *available at* https://lrgadjudication.nmcourts.gov/. Further, this Court has explained that judges should be presumed to have acted according to the law. *See*

generally Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986) ("'the law will not suppose a possibility of bias or favor of a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'" (quoting 3 W. Blackstone, Commentaries *361)).

Moreover, the United States incorrectly characterizes the rulings of the LRG Adjudication Court in making its bias argument. The United States suggests that the LRG Adjudication Court found that the Project right "does *not* include a right to deliver water to Texas under the Compact." U.S. Br. 47-48 (emphasis in original). This is incorrect. The LRG Adjudication Court's Order states that the "State's offer of judgment *appropriately recognizes Project deliveries to Texas as an essential element of the Project.*" LRG Adjudication Summary Judgment Order at 4 (emphasis added). Similarly, the United States warns that the protections afforded by New Mexico law would be "futile" because the LRG Adjudication Court did not agree with the United States on the nature of the Project right, and "strip[ped] the Project of essential protection for seepage and return flows." U.S. Br. 49. Even if the United States correctly described the ruling, a disagreement over the decisions of the LRG Adjudication Court is not a valid reason to seek an alternative forum. *See* Tex. Br. 29 (describing the rulings of the LRG Adjudication Court as "erroneous"). But here again, the United States has not properly described the decision of the LRG Adjudication Court, which, in fact recently clarified that "*reuse*

of seepage and return flow was a necessary component of the Project," Order Denying Joint Motion to Stay Proceedings in Stream System Issue 104 at 7, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. Dist. Ct.) (June 19, 2014) (internal quotation marks omitted), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/936-orderdenyjointmtnstay.pdf.[5]

In any event, as the *City of Las Cruces* court recognized, allowing the LRG Adjudication Court to determine the scope of the Project right "provide[s] a more effective remedy" than "a federal declaration" of the right. 289 F.3d at 1191-92. This is so because the LRG Adjudication Court will produce a "more comprehensive and cohesive remedy" by deciding the rights to all water users in the Lower Rio Grande Basin in New Mexico. *Id.* at 1191 (internal quotation omitted).

2. Texas' and the United States' position is that "[a]ny application of New Mexico state law to the Rio Grande Project . . . must fail as inconsistent with the Compact." Tex. Br. 62. As noted above, however, this contention is at odds with Texas' and the United States' own course of conduct. The United States

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[5] The LRG Adjudication Court's ruling is consistent generally with prior appropriation law in other western states. *See* P.M. Dwyer, Annotation, *Right of Appropriator of Water to Recapture Water Which Has Escaped or Is Otherwise No Longer Within His Immediate Possession*, 89 A.L.R. 210 (1934).

adjudicated its Project right for the Texas portion of the Project in Texas, and in 2010 the United States filed its statement of claim in the New Mexico adjudication court (a claim which does not include groundwater). United States Statement of Claim for Water for the Rio Grande Project, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Sept. 15, 2010) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/14-us-statement-claim-for-water-for-the-rio-grande-project.pdf.

3. Citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) and *West Virginia v. Sims*, 341 U.S. 22 (1951), Texas and the United States argue that "it defies common sense" for Texas' apportionment "to be defined by the *state* law of an upstream State." U.S. Br. 47 (emphasis in original); *see also* Tex. Br. 55-56. However, this Court has approved upstream state court determinations that affect compact rights and interstate delivery obligations, subject to this Court's oversight. *See, e.g.*, *Montana v. Wyoming*, 131 S. Ct. 1765, 1770-72 (2011) (holding that the amount of water to which the downstream state, Montana, is entitled depends in part on the scope of water rights adjudicated in the upstream state, Wyoming). Also, in *Kansas v. Colorado*, 543 U.S. 86 (2004), the Court upheld the Special Master's recommendation that the Court rely, in the first instance, on the Colorado water Court to quantify matters integral to computation of Colorado's compliance with the Arkansas River Compact. This Court

held that it was appropriate to allow the Colorado Water Court first to rule on replacement plans having a direct impact on Colorado's Arkansas River Compact obligations, noting that review in this Court would be available in the ordinary course if necessary. *Id.* at 103-04. That same reasoning should apply in the present case.

III. The Compact Does Not Prohibit Development or Require New Mexico to Maintain Depletions at 1938 Levels Below Elephant Butte

1. Texas' claim that the "Compact protects the Rio Grande Project and its operations under the conditions that existed in 1938," presumes a restriction prohibiting New Mexico from allowing additional development beyond the levels that existed in 1938. Tex. Br. 35. That implied restriction is nowhere in the Compact. New Mexico agrees that one of the Compact's purposes was to protect inflows to the Project. But the inclusion of explicit protections in the Compact for the supply of water *to* the Project does not give rise to implicit restrictions on water uses in the area below where water is released *from* the Project. Texas inexplicably leaps to the conclusion that the Compact's protection of supply *to* Elephant Butte must mean New Mexico is prohibited from allowing any development below Elephant Butte.[6]

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[6] Texas post-1938 water use in the Rio Grande has not remained static. Between 2000 and 2013 alone, El Paso County's

(Continued on following page)

No such express provisions exist. N.M. Br. 41-43. The Compact is silent on this point because protection for Project deliveries was already provided by Reclamation law and the doctrine of prior appropriation.[7] As noted in New Mexico's earlier briefs, other compacts explicitly restrict future depletions or require maintenance of a particular year's depletion condition, and the lack of such a provision here is telling. N.M. Br. 33.

2. Contrary to Texas' argument, it is entirely appropriate for the Court to consider the 1929 Temporary Compact when construing the 1938 Compact.

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population grew by 25.5%. City of El Paso, Community Profile, July 2013 (*citing* U.S. Census data), *available at* https://home.elpasotexas.gov/city-development/documents/why-el-paso/Community%20Profile.pdf. This population is supplied by water from the Rio Grande and the aquifers that underlie it in Texas and New Mexico. Texas has repeatedly affirmed its legal regime of "right to capture" which prohibits any governmental regulation of groundwater development. *See* Eric Opiela, *The Rule of Capture in Texas: An Outdated Principle Beyond Its Time*, 6 U. Denv. Water L. Rev. 87 (2002); *see Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 137-38 (Tex. App. 2013) (recognizing Texas' rule of capture). New Mexico, on the other hand, has long strictly limited new groundwater uses in the Lower Rio Grande. *See* http://www.ose.state.nm.us/doing-business/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf.

[7] Consistent with this silence, the Rio Grande Compact Commission accounting ends with releases of Usable Water from Caballo Dam, as it has since 1940. Thus, the parties' course of conduct demonstrates their understanding that New Mexico's Compact obligation is satisfied by delivery of the appropriate amount at Elephant Butte.

Texas Br. 48 & n.23. New Mexico offers Article XII from the 1929 Temporary Compact not to establish precedent, but as a clear example of an express provision prohibiting development on the Rio Grande below Elephant Butte, a provision that is conspicuously absent from the 1938 Compact. In addition, the 1929 Temporary Compact is part of the negotiating history of the 1938 Compact. It is precisely this material the Court has held to be proper for interpreting ambiguous provisions or silence in an interstate compact. Nothing in Article XVI of the 1929 Temporary Compact prohibits consideration of the 1929 Temporary Compact when interpreting the final Compact. *See Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991); *Tarrant Reg'l Water Dist.* at 2132.

As for the United States' claim that an express prohibition on development in the Lower Rio Grande, as appears in the 1929 Temporary Compact, was unnecessary in the final Compact because Article IV's delivery requirement accomplished the same result, U.S. Br. 39, Article IV simply does not deprive New Mexico of jurisdiction over the Lower Rio Grande. Because New Mexico law continues to apply to water rights in the Lower Rio Grande, the lack of an express prohibition on post-Compact development in this stretch of the river, as is found in the 1929 Temporary Compact, is relevant to any consideration of whether the Compact prohibits post-Compact development in the Lower Rio Grande.

3. The lack of express provisions in the Compact governing the Rio Grande between Elephant

Butte and Fort Quitman does not demonstrate a silent intent to freeze the conditions in this area as they existed in 1938. Rather, as discussed above, it demonstrates that the Compact drafters had no intention to modify the existing regime of state and federal laws that governed the delivery of Compact water through the Project. *See New Jersey v. New York*, 523 U.S. at 783 n.6 (compact silence understandable because parties knew the settled law). The Texas' and the United States' Complaints should be dismissed.

IV. The United States Has No Independent Cause of Action to Enforce the Compact

The United States incorrectly asserts that "[e]ven if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the Project, the United States' Complaint in intervention should nevertheless go forward." U.S. Br. 51. To the contrary, upon dismissal of the Texas' Compact claim, then the United States' Complaint in Intervention must also be dismissed. The United States is not a party to the Compact. There is no precedent in a compact enforcement action for allowing a complaint in intervention to proceed if the primary State-Party's Complaint has been dismissed.

As New Mexico previously explained, *United States v. Nevada*, 412 U.S. 534, 538-40 (1973), requires dismissal of non-compact water rights claims

because, in the Court's non-exclusive original jurisdiction the Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle [its] claims." N.M. Br. 63 (*citing United States v. Nevada*, 412 U.S. at 538). The United States argues that its claims here are distinguishable because they concern water allocated between two States and delivered to Mexico, whereas the United States' claims in *United States v. Nevada* concerned "competing claims to water within a single state." U.S. Br. 52 (*quoting United States v. Nevada*, 412 U.S. at 538). But this is a false distinction. All of the water rights relevant to this dispute are located in a single state, New Mexico, just as all the disputed water rights in *United States v. Nevada* were located in Nevada. The fact that some of the water involved is ultimately consumed outside of New Mexico is irrelevant to the application of the rule set forth in *United States v. Nevada*.

CONCLUSION

The State of New Mexico's Motion to Dismiss should be granted.

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RECORD AND BRIEFS

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

Motion Of Elephant Butte Irrigation District For Leave To Intervene, And Memorandum Of Points And Authorities

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MOTION OF ELEPHANT BUTTE IRRIGATION DISTRICT FOR LEAVE TO INTERVENE

INTRODUCTION

Intervenor Elephant Butte Irrigation District ("EBID") moves for leave to intervene in this original jurisdiction action. On January 27, 2014, this Court granted plaintiff Texas' motion for leave to file a bill of complaint against New Mexico and Colorado, and invited New Mexico to file a motion to dismiss. On April 30, 2014, defendant New Mexico filed a motion to dismiss Texas' complaint, and the motion is pending. On November 3, 2014, this Court appointed a Special Master to hear the case. No proceedings have taken place before the Special Master. Therefore, EBID's motion is timely.

DISCLOSURE STATEMENT (Fed. R. Civ. P. 7.1)

EBID is a governmental organization created by an act of the New Mexico Legislature, and therefore is not required to file a disclosure statement under Rule 7.1 of the Federal Rules of Civil Procedure.

GROUNDS FOR THE MOTION

1. Identity of Intervenor Elephant Butte Irrigation District

EBID is an irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico. EBID was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under the federal reclamation laws in providing water supplies from the lower Rio Grande for irrigation of lands in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16. Under the statute, EBID is authorized to enter into contracts with the United States for the construction, operation and maintenance of facilities that would develop such water supplies, to enter into contracts with the United States in order to obtain water supplies from such facilities, and to construct, operate and maintain various facilities – canals, ditches, reservoirs, sites, water, water rights, rights-of-way and other property – necessary for this purpose. *Id.*

Pursuant to its statutory authority, EBID entered into a contract with the United States in 1938, which will be more fully described later in this memorandum, under which EBID provides water supplies from the Rio Grande Project for water users in the Project area in New Mexico. Under the contract, EBID receives 88/155th of the water supply of the Rio

Grande Project, and uses the water to irrigate 90,640 acres of land in New Mexico. EBID has 6,700 members to whom it provides the water supplies, and is currently representing the interests of these members in an adjudication of water rights in the Rio Grande Project that is pending in a New Mexico state court. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct., N.M.).[1]

2. Elephant Butte Irrigation District Meets the Standards for Intervention, and Should Be Allowed to Intervene.

This Court has held that, as a "general rule," a non-state party may intervene in an original action between two or more states in the Supreme Court – where the non-state party's state "is already a party" – if the non-state party sustains its "burden" of "showing some compelling interest in his own right,

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[1] EBID was preceded by the Elephant Butte Water Users Association ("EBWUA"), which was organized in 1905 by property owners situated along the Rio Grande in southern New Mexico, and which had entered into a contract with the U.S. Bureau of Reclamation for water deliveries from the Rio Grande Project, which Congress authorized in 1905. Act of Feb. 25, 1905, 33 Stat. 814 (1905). EBWUA was dissolved when EBID was organized pursuant to authority of New Mexico law to cooperate with the United States in providing water for irrigation from the lower Rio Grande, and EBID executed a contract with the United States on January 7, 1918, as the successor to EBWUA. *Holguin v. Elephant Butte Irrigation District*, 575 P.2d 88, 90 (1977).

apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam); *see Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *Illinois v. Milwaukee*, 406 U.S. 91, 87 (1972).

As EBID explains in the attached memorandum, EBID meets the standards for intervention under this Court's decisions in *South Carolina*, *New Jersey* and other cases cited above. First, EBID has a "compelling interest in its own right," apart from its interest in a "class with all other citizens and creatures of" New Mexico, in intervening in this case. Second, EBID's interests are not "properly represented" by New Mexico, which is the state in which EBID resides. Third, EBID's interests are not properly represented by the other parties in this litigation, plaintiff Texas and intervenor United States. Therefore, EBID meets the standards for intervention and should be allowed to intervene.

3. Elephant Butte Irrigation District Asserts Different Legal Arguments Than the Parties, Which Provides an Additional Basis for Intervention.

EBID asserts different legal arguments concerning the issues raised in this case from the arguments

asserted by the other parties, Texas, New Mexico and the United States, and EBID believes that its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action. First, EBID argues that Texas' complaint should be dismissed because, contrary to Texas' theory, the Rio Grande Compact does not apportion Rio Grande water to Texas, or apportion such water based on 1938 conditions. Second, EBID argues that – to the extent that the Compact was intended to protect Texas' rights in Rio Grande water – Texas' rights were to be protected by agreements between the United States and the water districts, namely EBID and its sister agency in Texas, the El Paso County Water Improvement District No. 1 ("EPCWID"), which allocated water between Rio Grande Project users in New Mexico and Texas; therefore, Texas should be permitted to amend its complaint to make such allegations. Third, EBID argues that under the federal reclamation laws as well as state appropriation laws, the Rio Grande Project is authorized to recover its return flows and seepage flows, to the extent that such seepage flows do not percolate into the aquifer and lose their identity as waters belonging to the Project. Therefore, New Mexico cannot properly authorize water uses in New Mexico that prevent the Project from recovering such return flows and seepage flows. By the same token, the United States does not have the right to recover seepage flows that percolate into the aquifer and thereby lose their identity as waters belonging to the Project; therefore, contrary to the United States' argument, the United States

does not have the right to use "hydrologically connected groundwater" for the Project.

As explained above, EBID's views on these issues are different from the other parties, and may be helpful to the Court in addressing the merits of Texas' complaint and New Mexico's motion to dismiss. For this additional reason, EBID should be allowed to intervene in this action.

CONCLUSION

Because of the foregoing reasons, this Court should grant EBID's motion for leave to intervene.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

STATEMENT OF THE CASE

1. The Reclamation Act of 1902

In 1902, Congress enacted the Reclamation Act, which established a federal program to build and operate reclamation projects in the western states, in order to make the arid and semi-arid lands of the western states habitable and productive. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902); *California v. United States*, 438 U.S. 645, 663-668 (1978). The projects are operated by the U.S. Bureau of Reclamation ("Reclamation"), a branch of the U.S. Department of the Interior. Section 8 of the Reclamation Act provides that the federal government must acquire water rights for the reclamation projects under state law. 43 U.S.C. § 383 (Secretary of Interior must "proceed in conformity with" state laws relating to "control, appropriation, use, or distribution of water used in irrigation"); *California*, 438 U.S. at 664-668. Under Section 8, the right to use water under the Act "shall be appurtenant to the land irrigated," and "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

2. The Rio Grande Project Act of 1905

Shortly after passage of the Reclamation Act, Congress enacted the Rio Grande Project Act of 1905, which authorized construction of the Rio Grande

Project on the Rio Grande near Engle, New Mexico, the present site of the Elephant Butte Dam. Act of Feb. 25, 1905, 33 Stat. 814 (1905); *City of El Paso v. Reynolds*, 563 F.Supp. 379, 383 (1983). The purpose of the Rio Grande Project was to provide water for irrigation of lands in southern New Mexico and western Texas, and to fulfill the United States' anticipated treaty obligation to allocate a portion of Rio Grande water to Mexico. Pursuant to section 8 of the Reclamation Act, the United States acquired its water rights for the Rio Grande Project by filing notice, as required by the laws of the Territory of New Mexico.[1] The United States thus acquired the right to all unappropriated water in the Rio Grande and its tributaries for the Rio Grande Project for the benefit of EBID members.

3. The United States' Treaty With Mexico (1906)

In 1906, the United States entered into a treaty with Mexico for equitable apportionment of Rio Grande water between the two nations. *Convention Between the United States and Mexico providing for the Equitable Distribution of Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, 34 Stat. 2953

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[1] The United States' rights in the Rio Grande Project are currently being litigated in a general stream adjudication in a New Mexico state court, which was initiated by an action brought by EBID in the New Mexico state court. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M.).

(1906) (hereinafter "Treaty"). The Treaty obligates the United States, upon completion of the proposed storage dam at the present site of the Elephant Butte Dam, to deliver to Mexico 60,000 acre-feet of water annually from the Rio Grande. Treaty, Art. I, 34 Stat. 2954. The Treaty also provides that water shall be distributed to Mexico in the "same proportions" that water is delivered to lands in the United States "in the vicinity of El Paso, Texas," as set forth in a specific delivery schedule. *Id.* at Art. II, 34 Stat. 2954. The Treaty also provides that in cases of "extraordinary drought," the amounts delivered to Mexico shall be "diminished in the same proportion" as the water delivered to lands in New Mexico and Texas. *Id.*

4. The Water Districts (EBID and EPCWID)

After Congress authorized the Rio Grande Project, two irrigation districts were formed, one in New Mexico and the other in Texas, to carry out the functions of the Project in their respective states. In New Mexico, the property owners along the lower Rio Grande organized a water users association in 1905, the Elephant Butte Water Users Association ("EBWUA"), which in 1918 was dissolved and replaced by the Elephant Butte Irrigation District ("EBID"). EBID was created under New Mexico law for the purpose of "cooperating" with the United States in developing project water supplies for irrigation of lands situated along the Rio Grande in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16; *Holguin v. EBID*, 575 P.2d 88, 90

(N.M. 1977). On January 7, 1918, EBID, as successor to EBWUA, executed a contract with the United States, under which the United States agreed to provide water from the Rio Grande Project to the irrigation district in order to irrigate the lands within the district. *Holguin*, 575 P.2d at 90.

In Texas, the property owners situated along the Rio Grande in Texas organized a water users association, the El Paso Valley Water Users Association, which in 1917 was dissolved and replaced by the El Paso County Water Improvement District No. 1 ("EPCWID"). EPCWID was organized under Texas law to represent water users in Texas in acquiring and using Project water for irrigation of lands in Texas. *See El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957).

5. The Rio Grande Project

The Rio Grande Project, which began construction in 1910 and was completed in 1916, extends from Elephant Butte Reservoir, which is located on the Rio Grande in New Mexico about 100 miles north of the New Mexico-Texas border, to Ft. Quitman, Texas, which is located in Texas about 80 miles southeast of El Paso, Texas. National Resources Committee, Regional Planning, Part IV, *The Rio Grande Joint Investigation in the Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73 (1938) (hereinafter "Joint

Investigation"). The central features of the Rio Grande Project are the Elephant Butte Dam and Reservoir and the Caballo Dam and Reservoir, which is located in New Mexico about twenty-five miles downstream from the Elephant Butte Reservoir.[2] The Elephant Butte and Caballo dams impound Rio Grande water in their respective reservoirs, and the water, once released, then flows downstream and is diverted by six diversion dams[3] into canals running on each side of the river, from which the water is then delivered to nearby farmlands in order to irrigate the lands and grow crops. As the result of a Takeover Contract between the United States and EBID signed in 1980, which will be described more fully later, EBID operates and maintains the diversion dams in New Mexico and delivers the water to the canals for both districts, and delivers the water to the farmlands in New Mexico. *See City of El Paso v. Reynolds,* 563 F.Supp. 379, 380, 383 (D.N.M. 1983).

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[2] A map of the Project is attached as Appendix B to Texas' Brief in Support of Motion for Leave to File Complaint, at page A-2.

[3] The six diversion dams located below the Caballo Reservoir are, in sequential order, the Percha, Leasburg, Mesilla, American, International and Riverside Diversion Dams. The Percha and Leasburg Diversion Dams are located in New Mexico, and divert water to EBID. The Mesilla Diversion Dam is also located in New Mexico, and diverts water to both EBID and EPCWID. The Percha, Leasburg and Mesilla dams are operated and maintained by EBID under the 1980 Takeover Contract.

After EBID diverts Rio Grande water from the river and delivers it to farmlands in the district, a substantial portion of the used water is returned to the river through a drain system that was completed by the United States in 1916. Joint Investigation 73, 85. As a result of the Takeover Contract that will be described later, the drain system, which totals 457 miles in New Mexico, is owned and operated by EBID. The drain system was designed as part of the Project to allow used water to be returned to the river, and thus to be reused several times as the river flows through the Project area. Joint Investigation, 47-49, 55, 100. Additionally, a portion of the used water that is not captured in the drain system seeps into the ground, and is also capable of being returned to the river for additional downstream use. This process of diverting water for irrigation use and returning the drain flows and seepage flows to the Rio Grande is repeated several times, as the Rio Grande flows downstream through New Mexico and into Texas.

These drain flows and seepage flows are a vital component of the Rio Grande Project, because they allow the same water to be reused several times as part of the Project's water supply and thus enable the Project to fulfill its congressionally-authorized purpose by providing irrigation water for lands in New Mexico, Texas and Mexico. Because the drain flows and seepage flows are returned to the river for subsequent use, the Rio Grande Project typically delivers much more water for irrigation use than it actually releases from the Elephant Butte and Caballo

Reservoirs; in a full supply year, the Project releases an average of roughly 790,000 acre-feet of water from the reservoirs, and delivers an annual average of 930,000 acre-feet of water to irrigation users. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104, decision at p. 6 (Third Jud. Dist. Ct., N.M.). Thus, the drain flows and seepage flows are essential to fulfillment of the congressional purposes of the Rio Grande Project.

6. The Rio Grande Compact (1938)

As a result of increasing diversions of Rio Grande water in Colorado and New Mexico above Elephant Butte Reservoir commencing in the 1920s, the flow of Rio Grande water into Elephant Butte Reservoir was substantially reduced. Accordingly, the three states through which the Rio Grande passes – New Mexico, Texas and Colorado – entered into a compact, the Rio Grande Compact ("Compact"), to apportion the waters of the Rio Grande. The Compact was approved by representatives of the three states in 1938, ratified by the legislatures of the states in 1939, and approved by Congress in 1939. Act of May 31, 1939, ch. 155, 53 Stat. 785 (1939). Since Congress has consented to the Compact, the Compact is federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The Compact's purpose, according to its preamble, is to "effect[ ] an equitable apportionment" of Rio Grande waters. Preamble, 53 Stat. 785. The Compact is administered by the Rio Grande Compact Commission ("Commission"),

which is composed of one representative from each of the states of Colorado, New Mexico and Texas. Compact, Art. XII, 53 Stat. 791.

Under the Compact, Colorado is obligated to deliver a specified quantity of water at certain times of the year "at the Colorado-New Mexico State Line." Compact, Art. III, 53 Stat. 787.[4] New Mexico is obligated to deliver a specified quantity of water at certain times of the year "at San Marcial," which is located directly above the Elephant Butte reservoir. Compact, Art. IV.[5] The requirement that the water be delivered "at San Marcial" was changed in February 1948 to "into Elephant Butte Reservoir" by a Resolution adopted by the Rio Grande Compact Commission.

The Compact also provides that Colorado and New Mexico shall each receive "credit water" for any Rio Grande water that they deliver in excess of their obligations under the Compact, and shall be charged

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[4] Specifically, Colorado is obligated to annually deliver an amount of Rio Grande water, as measured at or near Lobatos, that is "ten thousand acre feet less than the sum of those quantities set forth in" specified "tabulations of relationship," which "correspond to the quantities at the upper index stations." Compact, Art. III, 53 Stat. 787.

[5] Specifically, New Mexico is obligated to annually deliver an amount of Rio Grande water at San Marcial, except for the months of July, August and September, that is "the quantity set forth in" specified "tabulations of relationships," which "corresponds to the quantity at the upper index station." Compact, Art. IV, 53 Stat. 788.

with "debit water" for any Rio Grande water that they fail to deliver in accordance with their obligations under the Compact. Compact, Art. I(g), -(h), -(i), -(j), -(m), 53 Stat. 785-792. The Project's "usable water" – that is, water available to serve the Project purposes – is all water, "exclusive of credit water," that is in Project storage and available for release in accordance with irrigation demands, including deliveries to Mexico. *Id.* at Art. I(l), 53 Stat. 786.[6]

Although the Compact effects an "equitable apportionment" of Rio Grande water, 53 Stat. 785, the Compact, in EBID's view, does not effect an equitable apportionment of water among the three states, Colorado, New Mexico and Texas. The Compact requires Colorado to deliver a specified quantity of Rio Grande water to New Mexico at the boundary between the two states, but does not similarly require New Mexico to deliver a specified quantity of Rio Grande water to Texas at the boundary between the two states. Instead, the Compact requires New Mexico to deliver a specified quantity of Rio Grande water at the Elephant Butte Reservoir, which is about 100 miles north of the New Mexico-Texas border. The Compact contains no provision requiring that New Mexico

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[6] "Project Storage" is "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project," but not more than a total of approximately 2.6 million acre-feet. Compact, Art. I(k), 53 Stat. 786. Thus, "project storage" includes only "usable" water, not "credit" water. *Id.*

deliver a specified quantity of water to Texas at the boundary between the two states, or at any other location. The Compact makes no mention of any specific allocation of Rio Grande water to Texas.

Thus, the Rio Grande Compact, unlike most interstate compacts that apportion interstate waters among different states, does not apportion Rio Grande water among the compacting states. Instead, the Compact (1) apportions Rio Grande water between the two upstream states, Colorado and New Mexico, by requiring Colorado to deliver a specified quantity of water to New Mexico, and (2) apportions the remaining Rio Grande water between (a) New Mexico above the Rio Grande Project and (b) the Rio Grande Project itself, by requiring New Mexico to deliver a specified quantity of water to the Project. In short, the Compact does not apportion any Rio Grande water to Texas, but instead apportions water to the Rio Grande Project, which serves users in New Mexico, Texas and Mexico. *City of El Paso v. Reynolds*, 563 F.Supp. 379, 385 (D. N.M. 1983).

The Compact contains no provision that apportions Rio Grande water *within* the Rio Grande Project area itself, that is, between water users in the Project area in New Mexico and Texas. Although a specific quantity of Rio Grande water – 60,000 acre-feet per year – is allocated to Mexico under the United States' Treaty with Mexico, 34 Stat. 2954, no mention is made in the Compact of any specific allocation of water between New Mexico and Texas, or between water users in the two states.

7. The United States' and the Water Districts' Contracts

A. The Apportionment Contracts

Although the Compact does not apportion Rio Grande Project water between New Mexico and Texas, the two irrigation districts in New Mexico and Texas that have been created by their respective legislatures – EBID and EPCWID – have entered into a contract with the United States, which effectively apportions Rio Grande water between the two states, by apportioning water between the users in the Project area in the two states. Thus, the water is apportioned between New Mexico and Texas not by the Compact, but instead by the contract between the irrigation districts and the United States.

Specifically, EBID and EPCWID entered into a contract on February 16, 1938, which was agreed to and approved by the Secretary of the Interior on April 11, 1938, and which provided that the allocation of Rio Grande Project water between the two irrigation districts shall be in proportion to the acreage contained in the two districts.[7] The amount of acreage in the districts is approximately 155,000 acres, approximately 88,000 acres of which are in EBID and approximately 67,000 acres of which are in EPCWID. *Id.* at p. 1. Thus, the water apportioned to EBID is 88/155, or approximately 57%, of the available supply,

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[7] A copy of the February 16, 1938, contract is attached as an Appendix to the Brief of the United States as Amicus Curiae.

and the water apportioned to EPCWID is 67/155, or approximately 43% of the supply. *Id.* The contract also provides that in the event of shortages, the distribution of the available water between the districts shall be made in the same proportion. *Id.* Under this apportionment, each acre of land with the Rio Grande Project area is entitled to the same amount of Project water as any other acre of land, regardless of the source of the water or the district in which the acre is located.

B. The Takeover Contracts

After the United States completed construction of the Rio Grande Project in 1917, the two irrigation districts, EBID and EPCWID, entered into separate reimbursement contracts with the United States, under which the districts agreed to reimburse the United States for its costs in constructing the Project in their respective states, and the United States agreed that, when the costs are reimbursed, the United States would transfer operation and maintenance of the Project facilities to the districts. *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 900 (W.D. Tex. 1955); *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88, 90 (N.M. 1977). After EBID and EPCWID completed their reimbursement payments to the United States, the United States entered into separate contracts with EBID and EPCWID in 1980 – the "Takeover Contracts" – under which the districts assumed operation and maintenance responsibilities for the

delivery of Project water to their members. In 1992, Congress enacted Public Law 102-575, which directed the Secretary of Interior to transfer title to EBID of all right, title and interest in the easements, ditches, laterals, canals, drains, and rights-of-way of the Project. Act of Oct. 30, 1992, 32 Stat. 388. The deed that transferred title to EBID, executed on January 19, 1996, marked the first transfer of title in the history of the federal reclamation program to a district that has reimbursed the costs of a federal reclamation project.

Notwithstanding the Takeover Contracts, the United States continues to own and operate the Elephant Butte and Caballo dams and reservoirs. The United States also continues to own the diversion dams in the river, but the Takeover Contract provides that EBID operates and maintains the diversion dams in New Mexico that divert Rio Grande water to both water districts for irrigation uses. Thus, EBID is contractually obligated to divert Project water from the diversion dams that provide supplies to both districts, and to maintain and operate the drainage system that captures the drain return flows and seepage flows and puts the water back into the river for further use in the Project area in New Mexico and Texas.

8. The New Mexico General Stream Adjudication

The Rio Grande Compact addressed the rights and duties of the signatory parties – New Mexico,

Texas and Colorado – to the surface waters of the Rio Grande, but made no mention of the signatories' rights to the groundwater. Accordingly, EBID brought an action in 1986 in a New Mexico state court for an adjudication of all water rights in the Rio Grande, including rights in groundwater, between Elephant Butte Reservoir and the New Mexico-Texas state line. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (Third Jud. Dist. Ct., N.M.). The action was brought against the New Mexico state engineer, the United States, the City of El Paso, and "all known and unknown claimants" to Rio Grande water in the affected portion of the river. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University, et al.*, 115 N.M. 229, 230, 849 P.2d 372 (N.M. 1993). EPCWID, although not named in the action, has participated as an amicus. EBID brought its action to protect its rights in Project water in New Mexico by seeking a determination of the amount and priority of its right, which would protect EBID's Project supply from junior appropriators and prevent the State Engineer from issuing any more groundwater permits until the adjudication was completed.

Although the New Mexico state engineer initially opposed EBID's action for a general adjudication of water rights, the state engineer changed his mind and, after being realigned as a plaintiff, filed an amended complaint against EBID and others, which also sought an adjudication of all water rights between Elephant Butte Reservoir and the New Mexico-Texas

state line. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al., supra*; *see United States v. Las Cruces*, 289 F.3d 1170, 1177-1178 (10th Cir. 2002). After filing the amended complaint, the state engineer began to conduct hydrological surveys of different sections of the river system, as mandated by New Mexico's statutory stream adjudication process. *Las Cruces*, 289 F.3d at 1177-1178.

One phase of the adjudication process – denominated as Stream System Issue 104 – seeks to adjudicate the United States' water rights for the Rio Grande Project. In that phase, the United States claims the right to Rio Grande surface water and Project return flows, and also groundwater that is hydrologically connected to the river. The adjudication court held that the United States – based on the filing of its claims in 1906 and 1908 – had the right to appropriate Rio Grande surface water, but declined to decide whether the United States had the right to the Project return flows or hydrologically connected groundwater. Instead, the court held that the United States' rights to the return flows and groundwater should be determined by the New Mexico state engineer as part of the administrative process for adjudicating water rights. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al., supra* (SS-97-104).

9. The Operating Agreement (2008)

Because of increased groundwater pumping in New Mexico that reduced the flow of Rio Grande water reaching Texas, EPCWID brought an action in the Texas courts against the United States and EBID, seeking an order directing the United States to operate the Rio Grande Project in accordance with the Rio Grande Project Act and the contracts between EPCWID, EBID and the United States. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., et al.*, No. EP07CA0027 (W.D. Tex. 2007). To settle the lawsuit, the United States, EBID and EPCWID entered into an Operating Agreement in 2008, which established an operational plan and allocation procedure for Rio Grande Project water. The Operating Agreement resolved the issue concerning the proper allocation of Project water between users in New Mexico and Texas as a result of increased groundwater pumping in New Mexico.

Under the Operating Agreement, EBID and EPCWID are allowed to carry over, or "bank," their allocation of Rio Grande water from one year to the next, rather than using their entire allocation in a single year. Operating Agreement, ¶¶ 1.8-1.11, pp. 2-3. As a result of the carryover provision, EPCWID will be allowed to carry over, and thus receive, more Rio Grande water than it has received in recent years, which will have the effect of alleviating the harm to Texas caused by increased groundwater pumping in New Mexico. The carryover provision was a substantial concession to EPCWID, because EPCWID has a

much greater incentive to conserve its allocation than EBID because of the urbanization of the Texas portion of the Rio Grande Project.

On the other hand, the Operating Agreement also limited the harm to groundwater pumpers in New Mexico, by changing the baseline for groundwater pumping in New Mexico from 1938, when the Compact was signed, to 1951-1978, when New Mexico experienced an unprecedented drought. By changing the baseline from the earlier date to the later date, the Operating Agreement effectively validated – and "grandfathered" – the rights of EBID member groundwater users in New Mexico who had increasingly extracted groundwater to supplement their surface water supplies during the 1951-1978 drought period.

In December 2011, New Mexico brought an action against the United States in the New Mexico federal district court, challenging the validity of the Operating Agreement. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). The water districts, EBID and EPCWID, were subsequently brought into the action as defendants. New Mexico alleges that the carryover provision, by effectively allocating a greater portion of Project storage water to EPCWID than it had been receiving before, reduced the amount of Rio Grande water available to New Mexico under the Compact, and thus violated the Compact. New Mexico's action has been stayed by the New Mexico district court.

The State of Texas – apparently concerned that New Mexico's action in the New Mexico district court will not adequately protect Texas' rights in Rio Grande water – then filed its motion for leave to file its complaint in the Supreme Court. Texas' complaint alleges that the Compact apportions a specific quantity of Rio Grande water to Texas based on conditions that existed in 1938, and that New Mexico is violating the Compact by authorizing the interception, depletion and diversion of Rio Grande waters, including Project return flows, that the Compact equitably apportioned to Texas.

If Texas prevails in its Supreme Court action on the theory expressed in its complaint, the Operating Agreement presumably would no longer be operative, because the Operating Agreement reflects an attempt to resolve the New Mexico-Texas controversy based on current conditions rather than conditions existing in 1938, and the Operating Agreement assumes that the Compact did not apportion a specific quantity of Rio Grande water to Texas based on 1938 conditions. In EBID's view, such an outcome would adversely affect the interests of EBID members in New Mexico, by reducing availability of groundwater supplies for its members who have benefitted from the redrawn baseline, and would also adversely affect EPCWID's interests, and thus Texas' interests, by precluding EPCWID from being able to carry over Project storage water from year to year.

ARGUMENT

I. ELEPHANT BUTTE IRRIGATION DISTRICT MEETS THE STANDARDS OF INTERVENTION, AND SHOULD BE ALLOWED TO INTERVENE.

A. An Intervenor in an Original Supreme Court Action Between Two or More States Must Show That It Has a "Compelling Interest in Its Own Right," Apart from Its Interest in a "Class" With Other Citizens of the State, Which Interest is Not Properly Represented by the State.

This Court has held that as a "general rule" a non-state party should be allowed to intervene in an original action between two or more states in the Supreme Court – where the non-state party's state "is already a party" – if the non-state party sustains its "burden" of "showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 130 S.Ct. 854, 863 (2010); *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam); *see Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *Illinois v. Milwaukee*, 406 U.S. 91, 87 (1972). EBID meets these requirements and should be allowed to intervene.

B. Elephant Butte Irrigation District Has A "Compelling Interest" in its Own Right, Apart from Its Interest in a "Class" With Other Citizens of New Mexico, in Intervening in This Case.

First, EBID has a "compelling interest" in its own right, apart from its interest in a "class" with other citizens of New Mexico, in intervening in this case.

EBID was created by an enactment of the New Mexico Legislature for the purpose of "cooperating" with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16. EBID represents the interests of agricultural users in southern New Mexico who receive water supplies from the Project for irrigation of their lands, and is responsible for delivering the Project water supplies to these agricultural users. EBID has entered into contracts with the United States, under which the United States provides the Project water supplies to EBID, which EBID then distributes to the agricultural users in New Mexico. EBID has also entered into contracts with the United States and EPCWID under which EBID operates and maintains diversion structures in the Rio Grande that divert water for both districts. Pursuant to a congressional enactment, the United States transferred the title to the Project distribution and drainage system to New Mexico, and thus EBID now has ownership of this system. In operating the system, EBID is responsible for capturing

and delivering the Project return flows for use in the New Mexico and Texas portions of the Project. Under the Operating Agreement, EBID is responsible for ensuring that water deliveries ordered by EPCWID are properly diverted through Project facilities in New Mexico and reach EPCWID. Thus, EBID has significant responsibilities in carrying out the functions of the Rio Grande Project in providing water for irrigation uses in New Mexico and Texas.

In addition, although the United States calculates the allocation of Project water between EBID and EPCWID at the start of each year, EBID is responsible for determining the allocation of the water among its members and the timing of the United States' releases of Project water from Elephant Butte and Caballo reservoirs. Under the Operating Agreement, EBID coordinates the releases of Project water for both EBID and EPCWID, and for irrigators in New Mexico and Texas.

Beyond its significant responsibilities in operating, maintaining and managing the Rio Grande Project in New Mexico, EBID also has significant responsibilities in effectuating the purposes of the Rio Grande Compact, which is the focal point of Texas' complaint here. As previously stated, the Compact provides for an allocation of Rio Grande water to the Rio Grande Project, in order to protect the integrity and feasibility of the project by ensuring that it has adequate water supplies to meet its congressionally-authorized purposes. Since EBID is responsible for providing Project water to users in New Mexico,

EBID has the primary responsibility for effectuating the Compact purposes as applied to New Mexico. In addition, as the upstream district in the Project area in New Mexico, EBID is contractually obligated to coordinate the delivery of Project water to EPCWID in Texas.

In short, EBID bears major responsibilities for managing the New Mexico portion of the Rio Grande Project, coordinating the delivery of the Texas portion of the Project water, and effectuating the congressional goal of protecting the integrity and feasibility of the Rio Grande Project. EBID is the only entity in this case that bears these major responsibilities and is not currently a party in this litigation.

Finally, EBID represents Project water users in New Mexico who have the "beneficial interest" in the Project's water rights. This Court, describing the respective rights of the United States and the water users in water developed by federal reclamation projects under the Reclamation Act of 1902, has stated:

> "Although the government diverted, stored and distributed the water, the contention . . . that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and the contract referred to, *the water-rights became the property of the land owners, wholly distinct from the property right of the*

> *government in the irrigation works*. . . . The government was and remained simply a carrier and distributor of the water. . . ."

Nevada v. United States, 463 U.S. 110, 123 (1983) (emphasis added), *quoting Ickes v. Fox*, 300 U.S. 82, 94-96 (1937). The Court stated:

> Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the *beneficial interest* in the rights confirmed to the Government resided in the owners of the land to which these water rights became appurtenant upon the application of Project water to the land.

Nevada, 463 U.S. at 126 (emphasis added). Therefore, the surface water users in New Mexico who receive Project water deliveries for irrigation of their lands possess the "beneficial interest" in the Project's water rights, and EBID represents these New Mexico water users. EBID is also awaiting a determination of its storage and diversion rights in the Project in the state adjudication proceeding, which will provide the legal basis for EBID to deliver Project water.

For the foregoing reasons, EBID has a "compelling interest" in its own right, apart from its interest in a "class" with other citizens of New Mexico, in intervening in this litigation.

C. Elephant Butte Irrigation District's Interests Are Not Represented By New Mexico.

EBID's interests in this case are not represented by New Mexico, the state in which EBID resides.

As mentioned above, EBID was created for the purpose of "cooperating" with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in New Mexico. Thus, EBID's statutory mission is to ensure the integrity and feasibility of the Project, which serves water users in both New Mexico and Texas. To that end, EBID has entered into contracts with the United States and EPCWID that provide for an allocation of Project water between water users in New Mexico and Texas, and that ensure that adequate Project water supplies reach users in both states. On the other hand, New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas. Thus, although EBID's and New Mexico's interests in this litigation converge in some respects, they diverge in other highly significant respects.

Because of their divergence of interests, EBID and New Mexico take divergent positions on several major issues relevant here. First, and most importantly,

they take divergent positions on whether the Operating Agreement, which EBID negotiated with the United States and EPCWID in 2008, promotes or impairs the goals of the Rio Grande Project and the Rio Grande Compact. EBID believes that the Operating Agreement promotes these goals by providing a fair and equitable allocation of water between Project water users in New Mexico and Texas. In EBID's view, the Operating Agreement provides a workable and practical – and equitable – resolution of a 28-year dispute between EBID and EPCWID, *i.e.*, between New Mexico and Texas, concerning the allocation of Project water between users in the two states. New Mexico, on the other hand, believes that the Operating Agreement impairs the goals of the Project and the Compact. New Mexico has brought an action in federal district court against the United States and EBID challenging the Operating Agreement, alleging that the Operating Agreement violates the Rio Grande Project Act and the Compact that effectuates the Act, and thus is illegal. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). Thus, while EBID believes that the Operating Agreement advances the Project and Compact goals by fairly allocating Rio Grande water between the two states, New Mexico believes that the Operating Agreement impedes these goals. Plainly New Mexico does not represent EBID's interests, or the interests of Project water users in New Mexico whom EBID represents, concerning the propriety and legality of the Operating Agreement.

Further, EBID and New Mexico also apparently disagree concerning whether Rio Grande Project return flows that result from drainage and seepage belong to the Project or instead are public waters subject to appropriation under the laws of New Mexico. Based on its complaint in the federal district court action in New Mexico, New Mexico apparently believes that the return flows are public waters of New Mexico and thus are available for appropriation under New Mexico law. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). EBID, on the other hand, believes that the return flows belong to the Project because they are generated by the Project, and thus the return flows are not available for appropriation under New Mexico law.

Additionally, as will be explained more fully in Argument No. II(B) below, EBID believes that the dispute between Texas and New Mexico concerning the interpretation of the Compact and the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law, and therefore that this Court is the appropriate forum in which to resolve the dispute. New Mexico, on the other hand, believes that these issues can properly be resolved by New Mexico courts applying principles of New Mexico law, and thus that Texas cannot pursue its claim under this Court's original jurisdiction. Again, New Mexico does not represent EBID's interests.

For all these reasons, EBID's interests are not represented by New Mexico.

D. Elephant Butte Irrigation District's Interests Are Not Represented By the Other Parties.

EBID's interests are not represented by the other parties in this litigation.

First, EBID's interests are not represented by Texas. Texas complains solely of harm to Texas and seeks relief solely for Texas, and does not complain of any harm to or seek relief for EBID. Further, Texas alleges in its complaint and its response to New Mexico's motion to dismiss that the Compact apportions a specific quantity of Rio Grande water to Texas based on 1938 conditions, and that New Mexico is interfering with Texas' apportionment of water by authorizing interception, depletion and diversion of water, including Project return flows, before the water reaches Texas. EBID, on the other hand, believes that the Compact did not apportion a specific quantity of Rio Grande water to Texas, much less apportion such water based on 1938 conditions. Instead, EBID believes that the Operating Agreement – not the Compact – provides an allocation of water to Project users in Texas, and thus to Texas itself. Also, EBID is located in New Mexico, and thus Texas cannot properly represent EBID's interests. For example, the Texas Compact Commissioner is appointed by the governor of Texas, and since EBID and its members

are located in New Mexico, they cannot vote and have no say concerning the appointments of the Texas Compact Commissioner. Thus, EBID's interests are not represented by Texas.

Second, EBID's interests are not represented by intervenor United States. Although the United States, like EBID, has an interest in the Rio Grande Project's fulfillment of its congressionally-authorized purposes, EBID – not the United States – is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas pursuant to EBID's contracts with the United States. Also, the United States transferred to EBID ownership, operation and maintenance of the Project drainage and distribution facilities in New Mexico, after EBID completed its reimbursement to the United States for its costs in constructing the Project in New Mexico. Thus, EBID, not the United States, is responsible for operating the diversion and distribution facilities that transport Rio Grande Project water to farmers for use in New Mexico. Also, EBID owns and operates the Project drainage system that captures the water after its usage for irrigation and transmits the drain return flows back to the Rio Grande for further downstream uses of the Project to farmers in New Mexico and Texas. EBID is also responsible for determining the allocation of Project water to its members, and for determining the appropriate dates and times of Project water deliveries to its members. Also, as noted earlier, EBID – in

representing the interests of water users in New Mexico who receive Project water – represents those who have the "beneficial interest" in the Project's water rights. *Nevada v. United States,* 463 U.S. 110, 123 (1983); *Ickes v. Fox*, 300 U.S. 82-94-96 (1937). Thus, EBID's interests are not represented by the United States.

II. ELEPHANT BUTTE IRRIGATION DISTRICT SHOULD BE ALLOWED TO INTERVENE BECAUSE IT ASSERTS DIFFERENT ARGUMENTS RELATING TO THE ISSUES IN THIS CASE THAN THE ARGUMENTS ASSERTED BY THE OTHER PARTIES, WHICH WOULD BE HELPFUL TO THE COURT IN ITS RESOLUTION OF THE ISSUES.

EBID also should be allowed to intervene because – in addition to the other reasons described above – EBID's arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in the case. EBID's arguments on these issues are as follows:

A. Texas' Complaint Should Be Dismissed Because – Contrary to Texas' Complaint – the Rio Grande Compact Does Not Apportion Rio Grande Water to Texas, and Does Not Apportion Water Based on 1938 Conditions.

Texas contends in its complaint and opposition to New Mexico's motion to dismiss that the Compact apportions Rio Grande water to Texas, that the apportionment is based on conditions prevailing in 1938 when the Compact was signed, and that New Mexico is interfering with Texas' apportionment by authorizing interception, depletion and diversion of water, including Project return flows, before the water reaches Texas.

On the contrary, the Compact does not apportion Rio Grande water to Texas, much less apportion water based on 1938 conditions. Rather, the Compact (1) apportions Rio Grande water between Colorado and New Mexico, by requiring Colorado to deliver a specific quantity of Rio Grande water to New Mexico each year, and (2) apportions the remaining Rio Grande water between (a) New Mexico uses upstream from the Rio Grande Project and (b) the Project itself. The main concern of the 1938 Compact was that increased upstream uses were depleting Rio Grande waters before they reached the Project, and the main focus of the Compact was to ensure that sufficient water reached the Project to enable it to fulfill its congressionally-authorized purpose of providing water for irrigation uses in New Mexico and Texas. Thus,

the Compact goal was to ensure that sufficient water reach the Project, not to directly apportion the water between New Mexico and Texas. New Mexico's sole delivery obligation under the Compact is to deliver a specified quantity of water to the Project each year, but not to deliver a specific quantity of water to Texas at the New Mexico-Texas state line. Nothing in the Compact mentions any obligation by New Mexico to deliver a specific quantity of water to Texas at the state line.

Although the preamble of the Compact stated that its goal was to provide an "equitable apportionment" of water, 53 Stat. 785, this meant only that the goal was to equitably apportion the water between Colorado, New Mexico above the Project area, and the Project itself. Although the Compact provides for a system of credits and debits depending on whether Colorado and New Mexico deliver more water or less water to the Project area than they are required to do, Compact, Art. I(g), -(h), -(i), -(j), -(m), 53 Stat. 785-786, the system of credits and debits ensures only that sufficient water reaches the Project area to enable the Project to provide sufficient water for irrigation uses in New Mexico and Texas, and does not suggest that a specific amount of water is apportioned to Texas.

Further, nothing in the Compact indicates that Texas was entitled to water deliveries based on conditions existing in 1938, when the Compact was signed. The Compact contains no provision stating or implying the preservation of 1938 conditions. Any

such provision would have limited future development of water uses in the Project area in New Mexico and Texas, and nothing in the Compact indicates an intent to limit such future development of uses.

Therefore, to the extent that Texas alleges that the Compact apportions water to Texas based on 1938 conditions, Texas has failed to state a claim on which relief can be granted, and to that extent its complaint should be dismissed.

B. The Compact Contemplated that Texas' Allocation of Rio Grande Water Would Be Determined by Agreements Between the United States and the Water Districts, and Texas Should Be Allowed to Amend Its Complaint to Make Such Allegations.

Although, as stated above, the main Compact goal was not an apportionment of water to Texas, the Compact nonetheless contemplated that Texas' rights and interests in Rio Grande water would be protected by an agreement or agreements between the United States and the water districts – EBID and EPCWID – that represent water users in the Project area within the respective states. In 1938 – one month before the Compact was signed – the United States and the water districts signed a contract allocating water between water users in the Project area in New Mexico and Texas, which allocated the water based on the amount of Project land in each state. Thus, each acre of Project land was entitled to receive the same

amount of Project water, regardless of whether the land was in New Mexico or Texas. The Compact negotiators were well aware of this contract when they signed the Compact, and they intended and expected that the rights and interests of water users in the Project area in New Mexico and Texas would be protected by the contract. Indeed, the Texas Compact Commissioner stated contemporaneously that "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. . . ." U.S. Brief in Opp. to Mot. to Dismiss 28. Since the contract provided that water would be allocated between the users in the two states based on the amount of Project land in each state, the contract provided a fair and equitable allocation of water between the users in the two states. In short, the Compact contemplated that the apportionment of water between New Mexico and Texas users in the Project area would be addressed by the contract between the United States and the water districts, and need not be directly addressed in the Compact itself. Cf. *Arizona v. California*, 373 U.S. 546, 580 (1973) (holding that under the Boulder Canyon Project Act the apportionment of Colorado River water between Arizona and California is determined by contracts signed by Secretary of Interior with users of the respective states).

More recently, as increased groundwater pumping in the Project area in New Mexico depleted the amount of water reaching Texas, the United States

and the water districts modified the 1938 contract by adopting the Operating Agreement of 2008, which balanced Texas' interests in obtaining more Project water and New Mexico's interests in allowing increased pumping of groundwater based on increased growth and an unanticipated drought in New Mexico. Under the Operating Agreement, each state was allowed to carry over its authorized storage from one year to the next, rather than using its entire storage in a single year (which effectively increased the amount of Project water flowing into Texas), in return for which the baseline for groundwater pumping in New Mexico was changed from 1938 to the drought years of 1951-1978 (which effectively "grandfathered" much of New Mexico groundwater pumping that had occurred subsequently to the Compact). The water districts, EBID and EPCWID, and the United States, in signing the Operating Agreement, determined that the Operating Agreement provided a fair and equitable allocation of Project water between New Mexico and Texas, and between the users in the respective states.

Since the Compact contemplated that the allocation of Project water between New Mexico and Texas would be established by a contract between the United States and the water districts, it follows that the 1938 contract signed by the United States and the water districts, as modified by the 2008 Operating Agreement, is a form of federal law, and therefore the 1938 contract and the 2008 Operating Agreement prevail over the laws of either New Mexico or Texas.

Therefore, while New Mexico is not obligated to deliver a specific quantity of Rio Grande water to Texas at the New Mexico-Texas state line, New Mexico cannot legally authorize water uses in New Mexico, including increased pumping of groundwater by non-EBID members, to the extent that such water uses interfere with the obligations of the United States and the water districts under the 1938 contract as modified by the 2008 Operating Agreement. Simply stated, the United States and the water districts are responsible for determining the appropriate allocation of water between Project water users in New Mexico and Texas through their contractual arrangements, and they have established these allocations by signing the 1938 contract and the 2008 Operating Agreement.[8]

If, as suggested above, Texas' complaint is dismissed on the ground that the Compact does not apportion water to Texas based on 1938 conditions, the Court should authorize Texas to file an amended complaint alleging, as argued above, that the 1938 contract between the United States and the water districts, as modified by the 2008 Operating Agreement, provides an allocation of water between water users in the Project area in the respective states, and

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[8] It follows that New Mexico's action challenging the validity of the Operating Agreement on the ground that it provides for delivery of more water to Texas than is authorized by the Compact, *see New Mexico v. United States*, No. 11-CV-0691 (D. N.M. Aug. 8, 2011), is without merit.

that New Mexico cannot authorize increased water uses in New Mexico by non-EBID members that interfere with the allocations established in these contracts and agreements. The question whether the Compact should be interpreted in the manner described above – that is, that the Compact contemplates that Project water allocations between New Mexico and Texas would be worked out in contractual arrangements between the United States and the water districts – involves a dispute between Texas and New Mexico concerning interpretation of the Compact and apportionment of Rio Grande water that is of sufficient "seriousness and dignity," *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992), to warrant resolution by this Court under its original jurisdiction. The question should not be resolved by the courts of New Mexico, as New Mexico argues, because "[a] State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia v. Sims*, 341 U.S. 22, 28 (1951).

C. Under the Federal Reclamation Laws, the Rio Grande Project is Authorized to Recover Return Flows and Seepage Flows That Do Not Lose Their Identity as Project Waters, and New Mexico Cannot Properly Authorize Increased Water Uses in New Mexico That Prevent the Project From Recovering Such Flows.

Under the federal reclamation laws, a federal reclamation project is authorized to recover return

flows and seepage flows generated by the project. *Ide v. United States*, 263 U.S. 497, 505 (1924). The project's return flows and seepage flows plainly belong to the project, because the flows would not have existed absent the project. Indeed, the appropriation laws of the western states generally recognize the same principle. Under the doctrine of recapture, "an appropriator who has diverted water for irrigation purposes has the right to recapture and reuse his own runoff and seepage water before it escapes his control or his property." *Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765, 1774 (2011).[9] Therefore, New Mexico cannot authorize increased water uses in New Mexico by non-EBID members, including in the Project area, that prevent the Project from recovering its return flows and seepage flows. To the extent New Mexico argues otherwise, its argument is misplaced.

In some cases, the Rio Grande Project seepage flows, as in the case of all seepage flows, percolate into the ground and become part of the native groundwater supply in the underlying aquifer. In such cases, the seepage flows can no longer be identified as Project waters, and therefore should be considered public waters available for appropriation under the laws of New Mexico. Therefore, the United States' argument that it is entitled to recover "hydrologically connected

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[9] Since the Rio Grande Project return flows remain on the "property" of the Project – even though they may have left the property of the individual irrigator – the doctrine of recapture applies to the Project return flows.

groundwater," and that such groundwater belongs to the Project and is not available for appropriation under New Mexico law, U.S. Brief in Opp. to New Mexico's Mot. to Dismiss, 30, 33, 37, 40, is also misplaced.

Although *California v. United States,* 438 U.S. 645 (1978), held that the United States must comply with state laws both in appropriating for and distributing water from federal reclamation projects, *California,* 458 U.S. at 665, 667, *California* also held that such state laws apply only to the extent they are not inconsistent with "clear congressional directives." *Id.* at 668. Congress authorized the Rio Grande Project Act in 1905 on condition that the Project is determined to be "feasible." 33 Stat. 814 (1905) (project authorized on condition that "there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, . . . should all other conditions as regards feasibility be found satisfactory"). Since the Rio Grande Project return flows and seepage flows are necessary to fulfill the congressionally-authorized purpose of making the Project "feasible," New Mexico laws cannot be applied to Project water uses under *California* to the extent that they would render the Project infeasible by authorizing appropriation of Project return flows and seepage flows necessary to fulfill the Project purpose.

The Compact is a federal law, because it was approved by Congress. *See, e.g., New Jersey v. New York,*

523 U.S. 767, 811 (1998). Since the Compact contemplated that Texas' rights in Project water would be protected by agreements between the United States and the water districts, the Project's rights to recover the return flows and seepage flows are governed by the 1938 contract, as modified by the 2008 Operating Agreement, and are not subject to appropriation under New Mexico law. For this additional reason, *California* does not support New Mexico's argument that water uses in the Project area are governed by New Mexico law.

In sum, New Mexico's argument that it has the right to authorize water uses in the Project area that interfere with the Project's recovery of return flows and seepage flows is incorrect, and the United States' argument that it has the right to hydrologically connected groundwater is also incorrect.

CONCLUSION

For the foregoing reasons, this Court should grant Elephant Butte Irrigation District's motion for leave to intervene.

Respectfully submitted,

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RECORD AND BRIEFS

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In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion to Intervene

TEXAS' BRIEF IN RESPONSE TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

Elephant Butte Irrigation District (EBID) seeks to intervene in this Original Action. The standard for intervention in an Original Action among states is high because it is intended to respect state sovereignty and protect the Supreme Court's limited resources. EBID's motion fails to meet this high standard and should be denied.

STATEMENT

The State of Texas was granted leave to file its Complaint in order to obtain a determination and enforcement of its rights, as against the State of New Mexico, to the waters of the Rio Grande pursuant to the Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1939) (hereinafter Rio Grande Compact or Compact). (The Rio Grande Compact is reprinted in the Appendix to the Complaint filed by Texas.) *See* Texas' Brief in Support of Motion for Leave to File Bill of Complaint at 1. The United States was allowed to intervene in this action, as a plaintiff, because of the distinct federal interests involved in this case that are best presented by the United States. *See* Motion of the United States for Leave to Intervene as a Plaintiff at 1-2.

New Mexico has moved to dismiss both the Texas and United States complaints. These motions to dismiss have been opposed by both Texas and the

United States; they were at issue long before EBID sought to intervene, and they are still pending.

EBID is not a party to the Rio Grande Compact. EBID fails to take a position as to whether it seeks intervention as a defendant or as a plaintiff. In its Motion for Leave to Intervene (hereinafter EBID Motion), EBID attempts to justify its intervention on the basis that it "asserts different legal arguments concerning the issues raised in this case from the arguments asserted by the other parties ... and ... [it] believes that its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action." *See* EBID Motion at 4-5. EBID further asserts that its views on these issues "may be helpful to the Court in addressing the merits of Texas' complaint and New Mexico's motion to dismiss." *See* EBID Motion at 6. While these purposes may justify allowing EBID to participate, as *amicus curiae*, in appropriate circumstances, they are not sufficient to meet the high intervention standard imposed by this Court.

ARGUMENT

I. EBID'S REQUEST FOR INTERVENTION SUFFERS FROM FATAL PROCEDURAL DEFECTS

EBID's Motion fails to include a proposed pleading that sets forth its legal position. The Federal Rules of Civil Procedure serve as a guide in this case. *See* Sup. Ct. R. 17.2. Federal Rule of Civil Procedure 24(c) requires that a motion to intervene "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought."[1] Fed. R. Civ. P. 24(c). Without the proposed pleading, it is impossible to ascertain EBID's position with respect to each claim in the existing action, and EBID's Motion merely becomes an occasion to argue its broad views about a case to which it is not a party. EBID elected not to file *amicus curiae* briefs on either Texas' Motion for Leave to File Bill of

[1] Although some courts take a lenient approach to the Federal Rule of Civil Procedure 24(c) requirement that a motion to intervene include a proposed pleading (*see, e.g., Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) [excusing the requirement where the intervention motion "fully stated the legal and factual grounds for intervention"]), such an approach is only suitable where the movant describes with specificity its position on the claims and defenses in the existing matter. As explained below, EBID's Motion and EBID's Memorandum of Points and Authorities in Support of Motion for Leave to Intervene (EBID Brief) do not serve as a suitable substitute for a proposed pleading.

Complaint or New Mexico's Motion to Dismiss. No Supreme Court rule provides non-parties the occasion to reargue positions or raise matters that could have been briefed at the time of original briefing. As a result, EBID's Motion is defective both for its failure to attach a proposed pleading, and as an untimely attempt to express *amicus* views on past due briefing. Accordingly, the Court should deny EBID's Motion for Leave to Intervene, and should not consider any matter raised by EBID regarding the merits of Texas' Complaint.

II. EBID'S REQUEST FOR INTERVENTION SHOULD BE DENIED ON ITS MERITS

A. Standard for Intervention

The appropriate standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (*New Jersey*). Under this standard, a non-state entity is only permitted to intervene where: (1) it has "some compelling interest in [its] own right," (2) that interest is different from "his interest in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373; *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (*South Carolina*). The Court has acknowledged that this is a high standard "and appropriately so" as it is intended to respect state sovereignty and protect the Supreme Court's limited resources. *South Carolina* at 267.

As the Court explained in *New Jersey*, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens." *New Jersey*, 345 U.S. at 372. The doctrine of *parens patriae* recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* This principle "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373.

Intervention in original actions has only been allowed in "compelling" circumstances. *New Jersey*, 345 U.S. at 373. The Court has a long history of "rejecting attempts by nonsovereign entities" to intervene in interstate water disputes. Until recently, in original actions involving interstate water disputes, the Supreme Court had only granted intervention to the United States and to Indian tribes. *South Carolina*, 558 U.S. at 277, 281-83. As Chief Justice Roberts explained in his dissent in *South Carolina*:

> The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State. And a private entity's interest in its particular

> share of the State's water once the water is allocated between the States, is an "intramural dispute" to be decided by each State on its own.
>
> *Id.* at 279 (Roberts, C.J. dissenting in part).

The Supreme Court has granted intervention in an interstate water dispute to a party other than the United States or an Indian tribe in only one case. That case provides for a limited exception where a unique set of circumstances is present. In *South Carolina* the Court reaffirmed the rule for intervention enunciated in *New Jersey*, but held that two of the three non-state parties were entitled to intervene under that high standard. *South Carolina*, 558 U.S. at 256. The Court allowed for the intervention of the Catawba River Water Supply Project (CRWSP), a bi-state entity that was jointly owned, regulated by, and provided water to one county in North Carolina and one county in South Carolina. *Id.* at 261. The Court found that the CRWSP had a "compelling interest in protecting the viability of its operations, which are premised on a fine balance between the joint venture's two participating counties." *Id.* at 270. The Court further allowed Duke Energy to intervene. *Id.* at 271. Duke Energy operated eleven dams and reservoirs (six in North Carolina, four in South Carolina, and one on the border between the two states) that controlled river flow and provided hydroelectric power to the region. *Id.* at 261. The

Court found that equitable apportionment of the Catawba River would need to take into account Duke Energy's water needs to power the region. *Id.* at 272. In addition, there was no other similarly situated entity on the river, setting Duke Energy's interests apart from all others. *Id.* The Court, however, denied the City of Charlotte's motion to intervene on the grounds that North Carolina, as the sovereign, would adequately protect the City's interests, and noted that Charlotte did not have interests on both sides (i.e., in both states) of the dispute. *Id.* at 274-75.

This Court's decisions instruct that only the United States, Indian tribes, or other uniquely situated entities, such as those that have direct bi-state interests (e.g., Duke Energy or the CRWSP), will be allowed to intervene in an Original Action, such as this one. Because interstate water disputes are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people," the States are presumed to speak in the best interests of their citizens as a whole, and intervention is not permitted where a entity wholly located and operating within a single state seeks to inject itself into the interstate dispute. *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

B. EBID Has Not Met the High Standard for Intervention

EBID claims that its "significant responsibilities" with respect to the Rio Grande

Project provide it with the "compelling interest" necessary for the Court to grant intervention. However, each of these "responsibilities" arise either out of EBID's role as a user of water in New Mexico, or as an entity that contracts for water from the United States. Such interests are not unique and are insufficient to support EBID's intervention.

Additionally, EBID argues that even though its interests and the State of New Mexico's interests converge in most respects, EBID's interests are not and cannot be represented by New Mexico. *See* EBID Brief at 24-27. EBID explains that it obtains its water through the Rio Grande Reclamation Project (Rio Grande Project) and it has contracts with the United States. EBID also argues it is entitled to intervene because New Mexico has challenged the 2008 Operating Agreement to which EBID is a party.

A fundamental defect in EBID's position is that it focuses on various contracts and agreements related to the Rio Grande Project as opposed to the Compact claims that Texas and the United States have pled in this original jurisdiction action. Texas brought this action against New Mexico to vindicate Texas' sovereign rights to the waters of the Rio Grande. Texas did not bring suit against the United States (or EBID) over the operation of the Rio Grande Project. While EBID might want to litigate these contract issues in this Court, they are simply not the subject of this litigation. While understanding these various contracts and

agreements may be important to resolving the instant dispute, this does nothing to transform EBID's interests to those of an appropriate intervenor.

1. EBID Does Not Have a Compelling Interest in Its Own Right Apart from Its Interest in a Class with Other Citizens of New Mexico

EBID's interest in this litigation is that of a user of water. There can only be two bases for that interest. Either it emanates from New Mexico state law, or it emanates from EBID's contracts with the United States for Rio Grande Project water. It is difficult to discern from where EBID believes its interest emanates. To the extent that it emanates from New Mexico state law, EBID's interest in Rio Grande water is an interest shared with other citizens in New Mexico and is therefore "properly pressed or defended by the State." *South Carolina*, at 279.

EBID, like all other water users in New Mexico, wants its interest in Rio Grande water protected. EBID's interest, to the extent it emanates from state law, is distinguishable from those of Duke Energy and the CRWSP who were allowed to intervene in *South Carolina*. EBID is solely a creature of New Mexico state law, is located wholly within New Mexico, and serves no lands outside of New Mexico. EBID's interest is indistinguishable

from those of the City of Charlotte. EBID, like the City of Charlotte, merely occupies a class of affected New Mexico users of water and the significance of EBID's responsibilities with respect to New Mexico's allocation of Rio Grande water does not set it apart from other members of this class. In *South Carolina*, the Court found such interests insufficient to justify intervention and it should do so here.

2. EBID's Interests Are Adequately Represented by Either the State of New Mexico or the United States

EBID admits that its views on a whole host of issues, in fact, converge with the State of New Mexico. *See* EBID Brief at 24. Conversely, in those areas where it asserts that its interests diverge with New Mexico, EBID conveniently ignores the fact that those divergent interests converge with the interests of the United States, a party to this litigation. The United States has primary responsibility for the Rio Grande Project, including the obligation to protect the operation of the Project and the delivery of water from the Project. Moreover, the United States is a party to each of the contracts and agreements that EBID cites in support of its position, including the 2008 Operating Agreement. None of these contracts

or agreements, in any way, supersedes the Compact.[2] Additionally, the mere existence of these contracts and agreements is not an appropriate basis for intervention.

EBID raises the dispute it has with New Mexico over drainage or seepage water, and whether that water belongs to the Rio Grande Project, as a further argument against New Mexico protecting EBID's interests. In making this argument, EBID again ignores the fact that the United States is a party to the litigation and is itself opposed to the New Mexico view on seepage and drainage and can, therefore, represent EBID's interests on this issue.[3]

EBID argues that it, not the United States, has the primary responsibility for the Rio Grande Project. EBID, however, fails to offer any support for the notion that the United States has, in any way, abrogated its role with respect to the Rio Grande Project.

EBID cites to *Nevada v. United States*, 463 U.S. 110 (1983) (*Nevada*) for the proposition that water users own the right to water in Reclamation Projects and, thus, have a unique interest in

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[2] In the event that the contracts and agreements become material, the United States is competent to address these issues and EBID will be free to file an *amicus* brief.

[3] To the extent that EBID's views with respect to groundwater differ from the United States, they "converge" with the views of New Mexico.

preserving those water rights. EBID Brief at 22-23. The holding of *Nevada*, however, is predicated on the assumption that the water rights at issue were obtained from and are based upon state law. Texas, however, has alleged that all of the water delivered into Elephant Butte Reservoir has been apportioned to Texas, subject to the United States' contract with EBID and the United States' delivery obligation to the nation of Mexico. EBID's rights are solely based upon its contract with the United States and not based on New Mexico state law.[4] The United States is a party to this litigation and is capable of protecting these contract rights. To the extent EBID's rights to water are subject to New Mexico state law only New Mexico has standing in this Court to assert those rights. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*).

In *Hinderlider*, the Colorado State Engineer appealed from an adverse judgment of the Colorado Supreme Court, in which that court had held, in effect, that the State Engineer could not curtail water rights in Colorado for the purposes of complying with the obligations of the State of Colorado under the La Plata River Compact. The ditch company asserted that the La Plata River

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[4] These issues were extensively briefed by Texas in its opposition to New Mexico's motion to dismiss. *See, e.g.*, Texas' Brief in Response to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention at 9-11, 19-20, 22, 27-29, 43-45, 53, and 59-62.

Compact violated the vested water right granted to it by the January 12, 1898 adjudication decree, and that the vested water right so awarded could not be modified or diminished except by condemnation and payment of just compensation. Since no condemnation proceeding had been commenced, the company had successfully argued to the lower court that the state was without power to curtail its water right in order to comply with the La Plata River Compact. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (Colo. 1933); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73, 70 P.2d 849 (Colo. 1937).

On appeal, the United States Supreme Court assumed that the water right adjudicated under the decree awarded the ditch company a property right that was indefeasible insofar as Colorado and its citizens and any other person claiming water in Colorado were concerned. The Court went on to hold, however, that the Colorado water right decree could not confer upon the ditch company rights in excess of Colorado's share of the waters of the stream, and Colorado's share was only an equitable portion thereof. *Hinderlider*, 304 U.S. at 106-07. In other words, state-created water rights only attach to that portion of an interstate stream that is equitably apportioned to the state, and the state court decree is not binding on citizens of another state who claim the right to divert water from the stream under that other state's equitable share of the interstate stream. When an apportionment of the waters of the interstate stream is made by

compact, the apportionment is binding on the citizens of each state and all water claimants, including water right owners whose rights predate the compact. *Id.* at 106; *see also Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36, 849 P.2d 372 (Ct. App. 1993) (citing *Hinderlider*, 304 U.S. 92) (stating that "[t]he apportionment of water under state compacts is binding on private water claimants"). No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

The State of New Mexico, in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact, and obligated itself to deliver water to Texas through the Rio Grande Project. Water would be stored, released, and delivered to Texas subject to Reclamation's contracts in New Mexico, i.e., EBID's contract, and the United State's treaty obligation to Mexico. New Mexico agreed not to interfere with Rio Grande Project operations that existed when the Compact was executed in 1938. The Rio Grande Compact is both federal law and New Mexico state law. As explained by *Hinderlider*, New Mexico's Rio Grande Compact apportionment is binding on all citizens of the state, including EBID and, therefore, EBID's interests are adequately represented either by New Mexico or by the United States.

3. EBID's Arguments Relating to the Issues in This Case Are Not Grounds for Intervention and, in Any Event, Should Be Disregarded by the Court

EBID asserts that it meets the high standard for intervention because it has "different legal arguments concerning the issues raised in the case from arguments asserted by [others already parties to the litigation] ... and that ... its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action." *See* EBID Motion at 4-5. However, providing "different legal arguments" has never been a ground for intervention in an Original Action. To the extent that EBID would like to assist the Court in better understanding the issues in this case, EBID can move to properly participate as *amicus*.

EBID's "assistance" at this juncture is based upon the absurd proposition that although the Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande, and that the Compact was entered into between the States of Colorado, New Mexico and Texas, it "does not effect an equitable apportionment of water among the three states." EBID Brief at 9. EBID then argues that while Colorado and New Mexico are both apportioned Rio Grande water, "[i]n short, the Compact does not apportion *any* Rio Grande water to

Texas."[5] EBID Brief at 10. Instead, EBID argues that the "third apportionment" of water was to the Rio Grande Project and, in essence, to EBID, which, pursuant to contracts entered into after the Compact was executed, allows EBID to provide water to a district in Texas. EBID then describes in some detail these contracts. EBID Brief at 32-36.[6]

It is undisputed that these contracts exist and they are important, but the instant action does not directly involve any of them. There simply is no evidence that these contracts were intended to (or could) change the Compact. EBID would relegate the Compact to an inferior position to contracts to which none of the sovereign states involved in this litigation is a party. This argument also flies in the face of the plain language of the Compact which confirms that it was entered into "for the purpose of effecting an equitable apportionment of the [waters of the Rio Grande]" among the three signatories (Rio Grande Compact, Preamble at App. 1), and ignores

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[5] Later in its brief, however, EBID admits "[t]he Rio Grande Compact addressed the rights and duties of the signatory parties – New Mexico, Texas and Colorado – to surface waters of the Rio Grande ...." EBID Brief at 13-14.

[6] These contracts are the 1938 Contract among EBID, El Paso County Water Improvement District No. 1 (EP#1), and the United States, the so-called "Takeover Contract" executed in 1980 between the United States and EBID, and the 2008 Operating Agreement among EBID, EP#1, and the United States.

the purpose and meaning of interstate compacts in general.[7]

EBID also asserts that the United States acquired the right to all unappropriated water in the Rio Grande and its tributaries "for the benefit of EBID members." EBID Brief at 2. EBID's statement ignores entirely that the Rio Grande Project was also intended to benefit lands in Texas. *See, e.g.*, Rio Grande Reclamation Project Act, Act of February 25, 1905, Pub. L. No. 58-104, ch. 798, 33 Stat. 814 (authorizing the Rio Grande Project to provide water for irrigation lands in both southern New Mexico and western Texas). Ignoring the State of Texas and lands within Texas that were to benefit from the Rio Grande Project, and later from the Compact, is a recurring theme in EBID's motion.

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[7] An interstate compact is a voluntary agreement between states enacted into law in the participating states upon federal congressional approval. *Black's Law Dictionary* 318 (9th ed. 2009). A congressionally approved interstate compact has the functional status of federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998). Two or more states often use interstate compacts to allocate the waters of interstate rivers and avoid lengthy litigation. The Supreme Court endorsed water allocation compacts when it noted "[a]bsent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts, *Arizona v. California*, 460 U.S. 605, 609 (1983), which often results in protracted and costly legal proceedings." *Tarrant Reg'l Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2125, 186 L. Ed. 2d 153, 162 (2013).

As further justification for its intervention, EBID also cites to two existing pieces of litigation to which it is a party. The first is *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct., N.M.), in which the scope and extent of the United States' water rights within New Mexico are being litigated. While this litigation may be important to EBID, that litigation has nothing to do with Texas' Compact rights which are at issue in the instant action.

The second case cited by EBID is *New Mexico v. United States*, No. 11-cv-00691 (D. N.M. Dec. 20, 2011), in which the validity of the 2008 Operating Agreement is being challenged by New Mexico. Texas is not a party to that litigation (or to the 2008 Operating Agreement), but both EBID and the United States are.[8] That action was stayed, pending the outcome of this Original Action to insure that the district court's decision comports with the Compact.

EBID, in its motion, attempts to re-write this litigation to make it entirely about EBID. While EBID may have a Reclamation contract with the United States, it nonetheless is still merely an irrigation district wholly within New Mexico and is not, in any way, a party to the Compact that is the

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[8] While Texas is not a party to the 2008 Operating Agreement, it has no reason to believe that it is inconsistent with the Compact.

actual subject of this action. No matter how hard EBID attempts to skew the facts, it simply is not a sovereign party to the Rio Grande Compact, and is not a proper party to this litigation.

Finally, EBID suggests that the Texas Complaint should be dismissed and that Texas should be allowed to amend its Complaint to comport with EBID's convoluted theories, including that EBID and not Texas was apportioned water under the Compact. *See* EBID Brief at 35-36. To the extent that EBID believes that the Texas Complaint should be dismissed, it could have sought leave to file an *amicus* brief in support of the New Mexico motion to dismiss. It did not do so and the time for doing so is long past. In any event, the argument itself is not a basis upon which intervention can be granted.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that EBID's Motion for Leave to Intervene be denied.[9]

Respectfully submitted,

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January, 2015

[9] In the event the Court grants EBID's Motion, entities within Texas that are similar to EBID should also be allowed to intervene.

RECORD AND BRIEFS

No. 220141, Original

Supreme Court U.S.
FILED
JAN 29 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion For Leave To Intervene

STATE OF COLORADO'S RESPONSE TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

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January 29, 2015

COMES NOW the State of Colorado by and through counsel, in compliance with the date established by the Deputy Clerk of the Court for filing a response, and submits this Response to Elephant Butte Irrigation District's Motion For Leave To Intervene, submitted in this matter, No. 141, Original, on December 3, 2014.

The State of Colorado must refrain from either supporting or opposing Elephant Butte Irrigation District's Motion For Leave To Intervene at this time. Whether it is appropriate for a non-state entity like Elephant Butte Irrigation District to intervene in this original action will depend in large part on the posture of the case following the Court's decision on New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention. For this reason, Colorado requests the opportunity to reserve its right to file a response to Elephant Butte Irrigation District's motion, to the extent it does not become moot, until 30 days after issuance of an interim report by the Special Master on New Mexico's Motion to Dismiss.

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RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 29 2015
OFFICE OF THE CLERK

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

This action concerns the interpretation of the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Preamble, 53 Stat. 785. On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against the States of New Mexico and Colorado. 134 S. Ct. 1050. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. 134 S. Ct. 1783. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. On November 3, 2014, this Court appointed A. Gregory Grimsal as Special Master, with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent

proceedings, and to submit reports as he deems appropriate. 135 S. Ct. 474.

On December 3, 2014, Elephant Butte Irrigation District (EBID) filed, in this Court, a motion for leave to intervene. EBID is a quasi-governmental organization created under New Mexico state law. Through a contract with the United States, EBID has a managerial responsibility to deliver water from the Bureau of Reclamation's (Reclamation's) Rio Grande Project (the Project) to EBID members, who are agricultural water users within its service area. In the view of the United States, EBID does not satisfy this Court's standard for intervention by a non-State entity, and EBID's motion for leave to intervene should therefore be denied.

STATEMENT

1. The Reclamation Act of 1902 provided authorization and funding for irrigation works in various States, including New Mexico. See Act of June 17, 1902, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. Construction of the Project began in 1910. Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73, 83 (Feb. 1938) (*Joint Investigation*). Elephant Butte Reservoir is in New Mexico, approximately 105 miles north of the Texas border.

In 1906, Reclamation entered into contracts with two irrigation districts: the entities now known as EBID in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas. Those contracts provide for the irrigation of approximately 155,000 acres of land—67,000 acres in Texas, and 88,000 acres in New Mexico. *Joint Investigation* 73, 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. See U.S. Br. in Opp. to N.M. Mot. to Dismiss App. 1a-4a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico.

The Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. *Id.* arts. I & II, 34 Stat. 2953-2954.

Today, Reclamation continues to calculate diversion allocations under the Project pursuant to the treaty and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement entered into by Reclamation, EBID, and EPCWID. See Bureau of Reclamation, U.S. Dep't of the Interior, *Operating Agreement for the Rio Grande Project* (Mar. 10, 2008) (2008 Operating Agreement), http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/OperatingAgreement2008.pdf. Under the 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for "return flows," from a given

volume of water released from Project storage based on 1951-1978 hydrological conditions. See Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment: Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 13-14, 18.

On March 18, 1938, the parties signed the Compact, and Congress approved the Compact the following year. 53 Stat. 785. Article IV of the Compact required New Mexico to deliver water at San Marcial, New Mexico—a gauging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission changed the gauge for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. para. 13; N.M. Br. in Opp. 1 n.1. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "Project Storage" for purposes of the Compact, Art. I(k), 53 Stat. 786), it becomes "Usable Water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

2. In its complaint, Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal

contracts. Tex. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground," downstream of Elephant Butte Reservoir in New Mexico. *Id.* para. 18.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact: (1) the parties' dispute concerns water released from a federal project for which Reclamation sets the diversion allocations for the irrigation districts downstream of Elephant Butte Reservoir; (2) the United States has an interest in ensuring that New Mexico water users who do not have contracts with the Secretary of the Interior (Secretary) for delivery of Project water, or who use Project water in excess of contractual amounts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries; and (3) the United States has an interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See U.S. Mem. in Supp. 5-8.

New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon

which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's water rights below Elephant Butte are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61).

3. On December 2, 2014, EBID filed, in this Court, a motion for leave to intervene. EBID is an irrigation district created under New Mexico law, and its boundaries lie wholly within New Mexico. N.M. Stat. Ann. § 73-10-16 (1978). It was created to be Reclamation's fiscal agent, to operate and maintain federal Reclamation facilities within its boundaries, and to deliver Project water to end users in New Mexico. *Ibid.*

The motion does not specify whether EBID seeks leave to intervene as a plaintiff or as a defendant. EBID explains (Mem. in Supp. 26) that it agrees with Texas (and thus disagrees with New Mexico) that "the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law, and therefore * * * this Court is the appropriate forum in which to resolve the dispute." EBID further contends (*id.* at 30-32), however, that Texas's complaint should be dismissed because the Compact "does not apportion Rio Grande water to Texas, much less apportion water based on 1938 conditions." In EBID's view (*id.* at 33-35), the Compact's "apportionment of water between New Mexico and Texas water users in the Project area [is] addressed by the con-

tract between the United States and the water districts," and that contract was modified by the 2008 Operating Agreement so that "the baseline for groundwater pumping in New Mexico" reflects conditions existing in 1951-1978.

EBID contends (Mem. in Supp. 20-23) that it has a compelling interest in its own right, distinct from its interest in a "class" with other New Mexico entities, to warrant intervention as an independent party in this original action. EBID describes its interests as follows: (1) EBID has significant responsibilities in carrying out the functions of the Project, such as determining how EBID's share of the Project water is allocated among its members, delivering Project water to end users in New Mexico, operating and maintaining the Project's diversion structures and drainage system, and "coordinat[ing] the delivery of [the Texas portion of] Project water to EPCWID" by virtue of being an upstream irrigation district (*id.* at 20-22); and (2) EBID "represents the Project water users in New Mexico who have the 'beneficial interest' in the Project's water rights" (*id.* at 22-23).

EBID further contends (Mem. in Supp. 24-29) that its interests are not adequately represented by the existing parties. EBID explains that "EBID and New Mexico take divergent positions on several major issues," including: (1) whether the 2008 Operating Agreement is consistent with the Compact (*id.* at 24-25); (2) whether return flows and seepage from the Project belong to the Project or instead are public waters subject to appropriation under New Mexico law (*id.* at 26); and (3) whether federal or state law governs the allocation of Rio Grande water below Elephant Butte Reservoir (*ibid.*).

EBID further contends (Mem. in Supp. 28-29) that its interests are not adequately represented by the United States because, according to EBID, "EBID—not the United States—is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas." *Id.* at 28.

Finally, EBID contends (Mem. in Supp. 29) that it should be allowed to intervene because its "arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in this case." EBID sets forth its position (*id.* at 29-33) that the Compact does not apportion any Rio Grande water to Texas but instead apportions water among Colorado, New Mexico, and *the Project*, which then divides Project water according to contracts. Those contracts, EBID contends, have been modified by the 2008 Operating Agreement, which "is a form of federal law." *Id.* at 34. EBID further sets forth its view (*id.* at 36-39) that the Project is entitled to return flows and seepage until the seepage "percolate[s] into the ground and become[s] part of the native groundwater supply in the underlying aquifer," at which point (according to EBID) it becomes public water available for appropriation under New Mexico state law.

ARGUMENT

This Court has held that "[a]n intervenor whose state is already a party * * * ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not

properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The standard for intervention in original cases by non-State entities "is high—and appropriately so," because original actions "tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" and because "respect for sovereign dignity" of the States, which "represent[] the interests of [their] citizens in an original action," "counsels in favor of restraint" in allowing non-State entities to intervene. *South Carolina* v. *North Carolina*, 558 U.S. 256, 267 (2010). EBID has identified no compelling interest, that is not adequately represented by the existing sovereign parties, to justify its participation as an independent party in this dispute.

1. EBID contends (Mem. in Supp. 20-22) that it has a unique interest in this case, distinct from other New Mexico citizens, because it assists the United States in carrying out the functions of the Project by determining how EBID's share of the Project water is allocated among its members, delivering Project water to end users in New Mexico, operating and maintaining the Project's diversion structures and drainage system, and "coordinat[ing] the delivery of [the Texas portion of] Project water to EPCWID" by virtue of being an upstream irrigation district. *Id.* at 22. But EBID's managerial role in operating Project facilities in New Mexico is not relevant to this dispute over the States' respective rights under the Compact.

The complaints filed by Texas and the United States seek to establish the sovereign rights among the States, the nature of the apportionment of water agreed to by the States under the Compact, and the rights of the United States on behalf of the Project

and under the treaty with Mexico. EBID is not a party to the Compact, and it acknowledges (Mem. in Supp. 13, 21) that the United States owns and operates the Project's dams and reservoirs and determines how much water is allocated to EBID and EPCWID, respectively, pursuant to the 1938 contract and the 2008 Operating Agreement. EBID's responsibility to manage Project deliveries within New Mexico after the Secretary determines EBID's share of the water has no effect on how the water is allocated among the States. EBID's motion confirms that its role in managing Project water within New Mexico concerns intrastate matters that arise only after the respective rights of the States under the Compact—the subject of the dispute in this suit—are satisfied.

2. a. Furthermore, EBID is a quasi-governmental entity created under New Mexico law, and its boundaries lie wholly within New Mexico. N.M. Stat. Ann. § 73-10-16 (1978). Accordingly, respect for the sovereign dignity of New Mexico counsels in favor of denying EBID's motion to intervene. This Court's requirement that an intervenor whose State is already a party must show a compelling interest that "is not properly represented by the state" flows from "the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all of its citizens." *New Jersey* v. *New York*, 345 U.S. at 372-373 (citation and internal quotation marks omitted). Treating the State as the representative of its citizens "is a necessary recognition of sovereign dignity" because it prevents the State from being "judicially impeached on matters of policy by its own subjects." *Id.* at 373. That concern is directly implicated by EBID's motion.

i. EBID contends that its interests are not adequately represented by New Mexico in this case because "EBID and New Mexico take divergent positions on several major issues," including: (1) whether the 2008 Operating Agreement is consistent with the Compact (Mem. in Supp. 24-25); (2) whether return flows and seepage from the Project belong to the Project or instead are public waters subject to appropriation under New Mexico law (*id.* at 26); and (3) whether federal or state law governs the allocation of Rio Grande water below Elephant Butte Reservoir (*ibid.*). That is precisely the type of "impeach[ment] * * * by its own subjects" that the Court has concluded is offensive to State sovereignty and inadequate to warrant intervention by a wholly intrastate entity. *New Jersey* v. *New York*, 345 U.S. at 373; see *South Carolina* v. *North Carolina*, 558 U.S. at 280 (Roberts, C.J., concurring in the judgment and dissenting in part) ("The State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court.") (citations and internal quotations marks omitted).

In *South Carolina* v. *North Carolina*, this Court allowed two non-State entities to intervene in an equitable apportionment action, but each of those entities had unique interstate characteristics that are not present here. The Catawba River Water Supply Project (CRWSP) was "an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States." 558 U.S. at 269. It was a "bistate entity" that was jointly owned and regulated by, and supplied water to, a county in each State, *id.* at 261, and it had "an advisory board consisting of representatives from both counties,"

"revenue[] from its bistate sales," and "infrastructure and assets that [we]re owned by both counties as tenants-in-common." *Id.* at 269; *ibid.* ("It is difficult to conceive of a more purely bistate entity."). The other entity that was permitted to intervene, Duke Energy, "operate[d] 11 dams and reservoirs in both States that generate[d] electricity for the region and control[led] the flow of the [interstate] river," making it "likely that any equitable apportionment of the river w[ould] need to take into account the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region." *Id.* at 272. Duke Energy also held a license from the Federal Energy Regulatory Commission (FERC) for its hydroelectric facilities, which regulated the flow of the river, and Duke Energy sought to protect a consensus agreement of 70 parties in both States, arrived at in connection with the proposed renewal of Duke Energy's FERC license, regarding appropriate minimum flows. *Id.* at 272-273.

In contrast to the non-State entities that were permitted to intervene in *South Carolina* v. *North Carolina*, EBID is an entity that operates only in New Mexico and manages EBID's share of the Project water supply within the State. In this respect, EBID is like the City of Charlotte, which was denied intervention in *South Carolina* v. *North Carolina* because, unlike CRWSP and Duke Energy, it was a North Carolina entity that fell within the general class of water users in that State, and its interests therefore fell "within the category of interests with respect to which a State must be deemed to represent all of its citizens." 558 U.S. at 274.

ii. To the extent EBID contends that it has a unique interest in protecting the Project's water supply, see Mem. in Supp. 21-22 (stating that EBID "bears major responsibilities for * * * effectuating the congressional goal of protecting the integrity and feasibility of the Rio Grande Project"), the United States has already intervened in this action to protect that interest. EBID acknowledges (*id.* at 13, 21) that the United States owns and operates the Project's dams and storage facilities and determines how water is allocated between EBID and EPCWID. EBID's contention (*id.* at 28) that "EBID—not the United States—is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas," does not mean that the United States cannot adequately represent EBID's interest in protecting the Project's overall water supply.

The Court has previously allowed Indian Tribes to intervene in an equitable apportionment action, even though the Tribes' interests were already protected by the participation of the United States. See *Arizona* v. *California*, 460 U.S. 605, 612-613 (1983). But the Court concluded that the Tribes' intervention was warranted because their water rights would be defined by the litigation, and the Tribes, as sovereign entities, were entitled to "take their place as independent qualified members of the modern body politic." *Id.* at 614-615 (citation omitted). EBID, in contrast, is not a sovereign entity with a direct property interest at stake in this litigation. See *Nebraska* v. *Wyoming*, 515 U.S. 1, 22 (1995) ("[W]ater disputes among States may be resolved * * * without the

participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.").

b. In addition to affording proper respect to the dignity of State sovereignty, treating the State as the representative of its citizens is also a "rule for good judicial administration," because "[o]therwise, * * * there would be no practical limitation on the number of citizens * * * who would be entitled to be made parties." *New Jersey* v. *New York*, 345 U.S. at 373.

Even assuming that Compact enforcement actions such as this could be litigated manageably with an expanded number of parties, the expansion could make it significantly less likely that any of these cases of interstate sovereignty could be resolved through negotiation. This Court has repeatedly stated that the preferred approach for resolving interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power." *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943); see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-106 & n.11 (1938). The participation of more parties, particularly parties that advance narrower interests that may conflict with the goals of their States, could impede that goal. See *South Carolina* v. *North Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in the judgment and dissenting in part) ("[I]ntervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement between the States, if not the power to block a settlement altogether.").

3. EBID's contention (Mem. in Supp. 29) that it should be allowed to intervene because its "arguments concerning the issues in this case are different from

the arguments of the other parties, which would help the Court to better understand the complicated issues raised in th[is] case," demonstrates that EBID can play an appropriate role in this litigation as an *amicus curiae*. See *Kentucky* v. *Indiana*, 445 U.S. 941 (1980); *New Hampshire* v. *Maine*, 426 U.S. 363, 365 n.2 (1976); *United States* v. *California*, 377 U.S. 926 (1964). EBID's views on the legal questions presented in this case (see Mem. in Supp. 29-39) can be presented to the Special Master and to the Court through the role of an *amicus curiae* without unnecessarily expanding the standard for intervention by non-State entities in original cases to include intrastate actors with no compelling interest that is not already protected by a sovereign party to the case.

CONCLUSION

EBID's motion for leave to intervene should be denied.

Respectfully submitted.

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RECORD
AND
BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF ELEPHANT BUTTE IRRIGATION DISTRICT FOR LEAVE TO INTERVENE

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SUMMARY OF ARGUMENT

Elephant Butte Irrigation District (EBID) does not meet this Court's high standard for intervention. This original action presents a dispute between States involving core sovereign interests, that, but for the Court's original exclusive jurisdiction under United States Constitution Article III, Section 2, clause 2 and 28 U.S.C. § 1251(a), would be a *casus belli*. The State represents all its citizens *parens patriae*, and therefore nonstate entities are not generally allowed to intervene. Interstate water compact cases concern the compact apportionment agreed to *by the States* under the Constitution, not state-law questions of how water is allocated among competing interests *within* the State. Contrary to EBID's claims, it has no special role in New Mexico's compliance with the Rio Grande Compact (Compact). It is an irrigation district that distributes water pro rata to its users in accordance with Reclamation Act contracts and state law.

The Court requires a potential nonstate intervenor to an original exclusive action to demonstrate (1) a "compelling interest in its own right, apart from [its] interest in a class with all other citizens and creatures of the state," and (2) "which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). Applying this high standard for intervention

here reveals that EBID does not have a sufficiently distinct interest to be allowed to intervene as a party alongside the States. In this case, the State of Texas seeks enforcement of the Compact and an injunction against the State of New Mexico enjoining New Mexico from actions Texas alleges are inconsistent with the Compact. The States of Colorado, New Mexico and Texas are the signatories to the Compact, and fully represent their water users with respect to the Compact. Like all other citizens in New Mexico, including municipalities supplying water for their citizens, EBID could be affected by the outcome of this case because all New Mexico water users and distributors must divide New Mexico's share of water. In this respect EBID is not unique; it is simply one among many that share a common interest with the State in ensuring that New Mexico receives its full share of Compact water. Nor does EBID play an independent role in New Mexico's Compact compliance. EBID is an irrigation district that distributes Rio Grande Project (Project) water from the river to its constituent farmers in New Mexico. The Court should deny EBID's Motion for Leave to Intervene (Motion) because EBID's interest is neither compelling nor unique, and New Mexico fully represents all of its water users and distributors, including EBID.

ARGUMENT

I. EBID DOES NOT MEET THE HIGH STANDARD REQUIRED TO INTERVENE IN THIS INTERSTATE COMPACT DISPUTE

"[T]he standard for intervention in original actions by nonstate entities is high – and appropriately so." *South Carolina v. North Carolina*, 558 U.S. at 267. Contrary to EBID's implication, *see* Memorandum of Points and Authorities (Mem.) at 19, there is no "general rule" favoring intervention by nonstate entities. Quite the opposite is true: the "general rule" is that a nonstate entity's motion to intervene "will be denied" unless it can meet the high standard that the Court has established. *Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *see South Carolina v. North Carolina*, 558 U.S. at 266. That standard, which serves the "twin purposes" of respect for "sovereign dignity" and "good judicial administration," is as follows:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

South Carolina v. North Carolina, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373).

"Respect for state sovereignty . . . calls for a high threshold to intervention" by purely intrastate political subdivisions like EBID to guard against the use of

the Court's original jurisdiction "as a forum in which 'a state might be judicially impeached on matters of policy by its own subjects.'" *Id.* at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). A State in its sovereign capacity "represents the interests of its citizens in an original action, the disposition of which binds the citizens." *Id.*; *see Nebraska v. Wyoming*, 515 U.S. at 21 ("Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens." (Internal quotation omitted)). In an interstate compact case, States alone possess the "core state prerogative to control water within their own boundaries." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013). In defending against another State's Compact claim, a state should not be required simultaneously to defend against any of its own citizens' particular views of the matter. Resolution of rights in a dispute between States invokes matters rooted in state sovereignty that rise "above a mere question of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). The Court's work here is to ascertain the States' intent from the plain language of the Rio Grande Compact Act of May 31, 1939, ch. 155, 53 Stat. 785, applying presumptions rooted in notions of state sovereignty. *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2132, 2133. For that reason, this Court has never allowed a political subdivision of a state to intervene over the objection of that state.

Moreover, a high standard for intervention is necessary to ensure that original actions, which already "tax the limited resources" of the Court, "do not assume the 'dimensions of ordinary class actions.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). If a nonstate entity could intervene merely on the basis of a difference of opinion with its sovereign, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

In this case, EBID cannot meet any of the prerequisites for intervention. It has shown only that it wishes to do that which the Court does not allow – impeach its own State in an original exclusive jurisdiction action.

II. EBID'S INTEREST IS NEITHER COMPELLING NOR UNIQUE

EBID has failed to show that it has a "compelling interest" in its own right, "apart from [its] interest in a class with all other citizens and creatures of the state." *See South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). EBID is a "creature" of the State of New Mexico.[1] The only interests that it represents are the

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[1] EBID characterizes itself alternately as a quasi-municipal corporation, Motion 2, and a political subdivision of the State of

(Continued on following page)

interests of water users residing in its territory wholly within New Mexico. It is not a bistate entity, and it does not purport to represent interstate interests. The Compact assigns it no rights or responsibilities. Its participation as an intervenor is not necessary to the resolution of the States' dispute. It has presented no persuasive reason to conclude that it has a compelling interest distinct from the interests of the other citizens and creatures of New Mexico. EBID argues it should be allowed to intervene because it disagrees with New Mexico on matters of Compact interpretation, but this Court has rejected that as a basis for intervention.

A. EBID Is a Creature of the State of New Mexico

The Court has consistently held that an entity created under state law such as EBID, whose State is already a party to an original action, does not meet the high standard of a compelling interest for intervention although the number of water users it represents and the importance of their interests may be substantial. Thus, in *New Jersey v. New York*, the city of Philadelphia failed to meet its burden of showing a compelling interest in its own right, although it represented more than half of the Pennsylvania citizens residing in the Delaware River watershed area that depended on its waters. 345 U.S. at 373-74.

New Mexico, Elephant Butte Irrigation District, Legal Updates (2014), http://www.ebid-nm.org/legalUpdates/.

Philadelphia's contention that it represented worthwhile interests of its own was insufficient, the Court explained, because if the Court undertook to evaluate "all the separate interests within Pennsylvania," it "could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* at 373.

Similarly, the city of Charlotte failed to show a compelling interest for intervention in *South Carolina v. North Carolina*, although the complaint in that action, without seeking relief against Charlotte directly, named the city "as an entity authorized by North Carolina to carry out a large transfer of water from the Catawba River basin" – "the largest single transfer identified in the complaint," amounting to 33 million gallons of water per day. 558 U.S. at 262, 274. As "a municipality of North Carolina," Charlotte occupied "a class of affected North Carolina users of water," and the Court held that "the magnitude of Charlotte's authorized transfer d[id] not distinguish it in kind from other members of the class." *Id.* at 274. Nor did Charlotte represent "interstate interests" falling on both sides of the dispute between South Carolina and North Carolina. *Id.* Rather, the particular interest that it asserted fell "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* The Court explained that "a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State,

as *parens patriae*, represents on behalf of its citizens." *Id.*

EBID does not have a beneficial use water right; it distributes water from the river to its members in New Mexico, who individually hold the beneficial use water rights, and thus does not rise even to the same position as Philadelphia and Charlotte, both of which were substantial water right owners in their own right. Like Philadelphia and Charlotte, however, EBID is undisputedly a creature of one of the compacting States. By its own description, it is "an irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico." Motion 2. It was created pursuant to an enactment of the New Mexico Legislature. Mem. 20; N.M. Laws 1915, Chap. 100, as amended by N.M. Laws 1917, Chap. 21 (providing for cooperation between irrigation districts and the United States under the Reclamation Act). It "represents the interests of agricultural users in southern New Mexico who receive water supplies from the [Rio Grande] Project for irrigation of their lands, and is responsible for delivering the Project water supplies to these agricultural users." Mem. 20. It does not claim to represent any interests or perform any functions within Texas. *See id.* at 20-23.

Thus, EBID, like Philadelphia or Charlotte, represents the interests of its resident water users and is responsible for delivering water to those residents. EBID makes no claim to "represent interstate

interests that fall on both sides of this dispute." *South Carolina v. North Carolina*, 558 U.S. at 274. To the contrary, it represents "the surface water users *in New Mexico* who receive Project water deliveries for irrigation of their lands." Mem. 23 (emphasis added). Of necessity it concedes that New Mexico also represents those interests in its sovereign capacity as a party to this original action: "New Mexico . . . represent[s] the interests of water users in New Mexico, including both Project and non-Project users. . . ." *Id.* at 24. By seeking to intervene in this original action, EBID claims the very power that the Constitution reserves to New Mexico – the power to represent the citizens and water users of the State with respect to an interstate compact. *See* U.S. Const. art. I, § 10, cl. 3. Thus, the interests EBID seeks to represent in this Court fall "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *South Carolina v. North Carolina*, 558 U.S. at 274.

B. EBID Is Not a Bistate Entity or an Entity Whose Participation Is Necessary to Resolve This Action

EBID's failure to meet this Court's high standard to be granted intervention is demonstrated in the contrast between it and the unique positions of the two nonstate entities that were permitted to intervene in an equitable apportionment action for the first time, *viz.*, the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke

Energy). *South Carolina v. North Carolina*, 558 U.S. at 269-73; *see id.* at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never.").

CRWSP had a compelling interest distinct from the interests of other citizens in *either* South Carolina or North Carolina because it was a joint venture of regulatory authorities in *both* States. *Id.* at 269. Unlike a political subdivision of one state dedicated to the interests of water users within that state, CRWSP served the water needs of approximately 100,000 individuals in each of the two States, transferring roughly half of its total withdrawals of water from the Catawba River to South Carolina consumers. *Id.* It had an advisory board with representatives from both States, operated infrastructure and assets owned by political subdivisions in both States, and drew its revenues from water sales in both States. *Id.* In short, it was "difficult to conceive of a more purely bistate entity." *Id.*

Duke Energy likewise had a compelling interest that could not be pigeon-holed as specific to one state or the other. It operated 11 dams and reservoirs in both States, through which it generated electricity for the entire region and controlled the flow of the river through the States. *Id.* at 272. There was no other similarly situated entity on the Catawba River. *Id.*

Moreover, it had a unique and compelling interest in protecting the terms of its federal regulatory license, which governed the river's minimum flow into South Carolina, as well as the terms of a comprehensive relicensing agreement representing the consensus of 70 parties from both States regarding the appropriate minimum continuous flow of the river. *Id.* at 261-62, 272-73. Duke Energy thus had a direct interest in the subject matter of the equitable apportionment action, an interest that was distinct from those of the class of citizens in either of the States. *Id.* at 273.

EBID does not argue that it is comparable to CRWSP. It does not argue that its asserted interests are "bistate" in nature, or independent of the interests of New Mexico water users. Nor could EBID make such a showing. It has conceded that, unlike a "purely bistate entity" such as CRWSP, *id.* at 269, it is a creature of the State of New Mexico, created pursuant to New Mexico law, and dedicated to the interests of the New Mexico water users within its territory. Motion 2; Mem. 20. It has no bistate oversight, operations, infrastructure, revenues, sales, customers, or constituents. It is a purely New Mexican entity representing purely New Mexican interests.

Nor has EBID demonstrated "powerful interests," comparable to those of Duke Energy, "that likely will shape the outcome of this litigation." *South Carolina v. North Carolina*, 558 U.S. at 271. Duke Energy had a unique interest in "the very subject matter in dispute," namely, the Catawba River's minimum flow

into South Carolina. *Id.* at 273. The importance of that interest was a function of the "'flexible'" nature of an equitable apportionment adjudication, in which "'all relevant factors'" are to be considered. *Id.* at 271 (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)). By contrast, the subject matter in dispute in the present case, as pleaded in Texas' complaint, involves the meaning and application of the Rio Grande Compact. Complaint ¶¶ 4, 10-28; *see Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("'[A] Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms.") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)). EBID has offered no persuasive reason to conclude it has a unique or compelling interest in the meaning or application of the Compact that is apart from the interests of the States who are the parties to the Compact and to this original action. It is the States' intent, not EBID's, that matters and the States, along with the United States in this case, are the only proper parties to this original action.

EBID claims that as the entity "responsible for providing Project water to users in New Mexico," it has "the primary responsibility for effectuating the Compact purposes as applied to New Mexico." Mem. 21-22. EBID is mistaken. New Mexico, as a signatory of the Compact, has the responsibility for effectuating the Compact purposes for New Mexico. Complaint, App. 1, 20; *see Kansas v. Colorado*, 533 U.S. 1, 8 (2001). EBID no doubt carries out "significant responsibilities in operating, maintaining and managing the

Rio Grande Project in New Mexico."[2] Mem. 21. Fundamentally, EBID carries out its responsibilities, as an instrumentality of the State of New Mexico. Motion 2. It cannot arrogate to itself the position of a sovereign party to the Compact when, in fact, it is only a subdivision of one such sovereign.

EBID has failed to articulate any relevant basis for allowing it to intervene. Accepting such arguments for the first time here would open the door to intervention by any number of similarly situated entities in New Mexico and Texas. *See New Jersey v. New York*, 345 U.S. at 373 (recognizing that if Philadelphia were granted intervention, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties"). If EBID is allowed to intervene, other political subdivisions, including the city of Las Cruces, the El Paso County Water Improvement District No. 1 (EPCWID), the Hudspeth County Conservation and Reclamation District No. 1, and the city of El Paso in Texas, all can be expected to seek intervention as well. All of those entities receive deliveries of Project water or include numerous Project beneficiaries within their borders.

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[2] EBID also claims responsibilities "in effectuating the purposes of the Rio Grande Project." Mem. 21. But as explained in New Mexico's Motion to Dismiss, and in Section II.C, below, it is the United States that has ownership of the Project diversion, storage, and release rights and is ultimately responsible for delivery of water to both irrigation districts under Reclamation law.

"Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states." *Id.* Other similarly situated water users in the Lower Rio Grande basin, such as the New Mexico Pecan Growers, may assert interests distinct from EBID's. EBID has offered no rationale for allowing it to intervene while ignoring the requests of many other similarly situated entities, both public and private. *See South Carolina v. North Carolina*, 558 U.S. at 269-73; *see id.* at 287 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well – and we will be hard put to refuse them.").

In sum, the States as sovereign parties to an original action presumptively represent all of their "citizens and creatures." *South Carolina v. North Carolina*, 558 U.S. at 266-67. EBID has not carried its burden of overcoming that presumption by showing that it has an interest "apart" and different in kind from those of all other citizens and creatures of New Mexico. *Id.* at 266.

C. The Compact Assigns No Rights or Obligations to EBID

Contrary to EBID's claims,[3] Mem. 9, the Compact's plain and unambiguous language apportions water among Colorado, New Mexico and Texas.

> The State of Colorado, the State of New Mexico and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman,

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[3] EBID also incorrectly alleges a number of facts about the Project and New Mexico's position. Though not bearing directly on intervention, they bear directly on issues currently in litigation in other fora, and thus deserve note. For example, the right asserted by and adjudicated to the United States is a *surface* water right. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (Aug. 16, 2012). New Mexico did not contest that this right includes the right to redivert and reuse Project return flows that reach a drain or the river downstream from the first place of use. *Id.*, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference (Feb. 17, 2014). Nor has New Mexico, as EBID alleges, ever asserted a right to interfere with the Project return flows. *Compare* New Mexico's Motion to Dismiss at 18, 59 (Apr. 30, 2014) with Mem. 36-38. New Mexico disputes many other allegations of fact scattered throughout EBID's Motion and reserves the right to contest other allegations of fact should they become relevant in future proceedings herein.

> Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective governors,
> . . . .

Compact, ¶ 1.

The Compact apportionments are to the States and the delivery obligations explicitly assigned to the two upstream States, Colorado and New Mexico. *Id.*, Arts. III, IV ("The *obligation of Colorado* to deliver water in the Rio Grande at the Colorado-New Mexico state line. . . ."; "The *obligation of New Mexico* to deliver water in the Rio Grande at San Marcial. . . .") (emphasis added). Neither of the irrigation districts receiving Project water is mentioned in the Compact, and the Compact apportioned no water to either of those entities. New Mexico's stated delivery point is upstream of EBID. EBID has no role in New Mexico's Compact compliance. Nor does the irrigation districts' 1938 Reclamation contract "apportion" water to EBID, as EBID claims, Mem. 11, *see* App. 1a-4a, U.S. Brf. Amicus Curiae (Dec. 10, 2013), rather, it allocated water to the districts by authorized acreage under applicable Reclamation law. EBID's 1980 "Takeover Contract," Mem. 12, only transfers certain facilities in New Mexico to EBID, along with the obligation to operate and maintain those facilities at no cost to the United States. Finally, the Compact confers no rights or obligations on EBID to administer or ensure compliance with its terms. Rather, the Compact specifically

appoints a New Mexico official, the State Engineer, to the Compact Commission, which is responsible for administering the Compact. Compact, Art. XII.[4] It is New Mexico, as a signatory to the Compact, that is responsible for compliance with the Compact, not EBID. *See generally Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (compact apportionment "is binding upon the citizens of each State and all water claimants"); *accord West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (an interstate compact "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations").

Moreover, EBID claims to perform "significant responsibilities in operating, maintaining and managing the Rio Grande Project in New Mexico." Mem. 21. However, its discretion in performing those functions is limited. It is the United States that owns the right to divert and store water in the Project, and the individual farmers that have perfected the beneficial use rights for irrigation under Reclamation and New Mexico law. 43 U.S.C. §§ 372,[5] 383; *Ickes v. Fox*, 300

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[4] "To administer the provisions of this compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The state engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico." Compact, Art. XII.

[5] § 372. Water right as appurtenant to land and extent of right. The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

(Continued on following page)

U.S. 82, 95 (1937). While the United States has transferred ownership of some appurtenant delivery structures, it has not and cannot transfer ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without additional Congressional action. *See* 43 U.S.C. § 498; *see also U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (holding federal agencies may not delegate authority to outside entities, public or private, absent express congressional consent).

EBID thus fails to assert any interest in the Compact that distinguishes it from the class of all affected Rio Grande water users in New Mexico. Like all other irrigation districts in New Mexico, it is a creature of the State. *Tompkins v. Carlsbad Irr. Dist.*, 630 P.2d 767, 769 (N.M. Ct. App. 1981). EBID is contractually obligated to maintain certain Project facilities in New Mexico and deliver the Project water it receives from the United States to its members in New Mexico, delivering an equal amount of water to all appurtenant properties.[6] Mem. 5, 12 & n.3. EBID does deliver water into canals which ultimately deliver water to other canals which serve EPCWID Project lands, and operates Project drainage facilities in New Mexico that collect return flows that might ultimately result in river flows to lands in EPCWID.

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beneficial use shall be the basis, the measure, and the limit of the right.

[6] Contrary to EBID's implication, Mem. 12, the only source of water for the Project is surface water.

But it is a purely New Mexico entity that has no authority in Texas. EBID owns no beneficial use rights of its own, *id.* at 22-23. Like other irrigation districts, EBID conveys and distributes its members' water in accordance with state law and as adjudicated in state court.

III. EBID'S INTEREST IS REPRESENTED BY NEW MEXICO, ITS STATE OF INCORPORATION AND SOLE STATE OF OPERATION

EBID has also failed to show that its asserted interest in this original action "'is not properly represented'" by the State of which it is a part. *South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). To reiterate, the Court begins with the presumption that a State in its sovereign capacity represents the interests of all of its citizens and creatures. *Id.* at 267; *Nebraska v. Wyoming*, 515 U.S. at 21-22. North Carolina's response to the city of Charlotte's motion to intervene in *South Carolina v. North Carolina* readily applies here:

> [T]he State must represent the interests of every person that uses water from the North Carolina portion of the Catawba River basin. In fact, the State has a particular concern for its political subdivisions, such as Charlotte, which actually operate the infrastructure to provide water to the State's citizens. . . . The

> State has every reason to defend the [transfers] that it has authorized for the benefit of its citizens. The State cannot agree with any implication that because it represents all of the users of water in North Carolina it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina.

South Carolina v. North Carolina, 558 U.S. at 275 (quoting Brief for State of North Carolina in Response to City of Charlotte's Motion for Leave to Intervene and File Answer 1-2). Like North Carolina, New Mexico's interests are aligned with all of its water users and carriers, including EBID, in ensuring that it receives its full share of Compact water.

If anything, the State's interest in representing all of its citizens and political subdivisions is *stronger* in an action arising under an interstate compact than it is in an equitable apportionment action such as *South Carolina v. North Carolina*. In an equitable apportionment action, a State is deemed to represent its citizens by virtue of the *parens patriae* doctrine. *South Carolina v. North Carolina*, 558 U.S. at 266. The State's interest as *parens patriae* "has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition." *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Even when the State properly acts as *parens patriae*, moreover, the "flexible" nature of an equitable apportionment action allows the Court "to seek out the

most relevant information from the source best situated to provide it," which may include the individual interests of nonstate entities. *South Carolina v. North Carolina*, 558 U.S. at 272 (citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), where 17 private pipeline companies were granted intervention "in the interest of a full exposition of the issues").

In an original action under an interstate compact, by contrast, there is nothing "quasi" about the States' sovereign interests. *See Hinderlider*, 304 U.S. at 106 (citing *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837)). New Mexico's interest in this action derives not from an amorphous "judicial construct," *Alfred L. Snapp & Son*, 458 U.S. at 601, but directly from its status as a party to the Rio Grande Compact. Complaint, App. 1, 20. As a signatory State, New Mexico "unquestionably" has "a direct interest of its own" and properly takes "full control" of the litigation on behalf of its citizens where the Compact's meaning and application are at issue. *Kansas v. Colorado*, 533 U.S. at 8. And as in any ordinary contract action, the Compact's meaning is properly determined not by a broad search for input from whatever source, *South Carolina v. North Carolina*, 558 U.S. at 272, but by determination of the parties', that is, the States' intent and application of the Compact's terms in an adjudication between the compacting parties. *See Texas v. New Mexico*, 482 U.S. at 128.

EBID thus must overcome the presumption that New Mexico as the signatory to the Compact properly represents the interests of all of its citizens and

creatures. It must also overcome its own concession that, in fact, New Mexico represents the interests of the Project water users that EBID seeks to represent as well. Mem. 24 ("New Mexico . . . represent[s] the interests of water users in New Mexico, including both Project and non-Project users. . . ."). Its attempt to overcome that concession fails on its own terms. EBID argues that its interest diverges from New Mexico's interests because it has a "statutory mission" to ensure the integrity and feasibility of the Rio Grande Project. *Id.* But in so arguing, EBID has lost sight of who gave it its statutory mission. As EBID elsewhere concedes, it was "created under New Mexico law" pursuant to "an enactment of the New Mexico Legislature." *Id.* at 3, 20. In carrying out its statutory mission, it carries out an interest of the State of New Mexico. As such the "divergence of interests" on which EBID predicates its argument, *id.* at 24, simply does not exist.

EBID further maintains that its supposed divergent interests have led it and New Mexico to take "divergent positions." Mem. 24-26. To whatever extent EBID may take views different from the State's on particular issues, however, such differences do not show that New Mexico cannot properly represent EBID's interest in this action. Those differences of opinion only show that EBID's admitted goal in intervening is to impeach its home state – something this Court has said it cannot do. Disagreements between and among the citizens and creatures of a State are a fact of life in a pluralistic society. The

Court's concern that it not be "drawn into an intramural dispute over the distribution of water" presupposes that disputes within a State can and do exist. *New Jersey v. New York*, 345 U.S. at 373. Nevertheless, intramural disagreements in themselves will not justify a nonstate entity's intervention for the precise reason that, if they did, the State "'might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373); *see id.* at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State 'must be deemed to represent *all* its citizens,' not just those who subscribe to the State's position before this Court. The directive that a State cannot be 'judicially impeached on matters of policy by its own subjects' obviously applies to the case in which a subject disagrees with the position of the State.") (quoting *New Jersey v. New York*, 345 U.S. at 372, 373) (additional citation and internal quotation marks omitted). New Mexico properly represents the interests of its citizens and subdivisions in this Court whether or not they agree on all issues.

CONCLUSION

EBID's motion for leave to intervene should be denied.

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RECORD AND BRIEFS

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

Elephant Butte Irrigation District's Reply To Briefs Opposing Motion For Leave To Intervene

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ELEPHANT BUTTE IRRIGATION DISTRICT'S REPLY TO BRIEFS OPPOSING MOTION FOR LEAVE TO INTERVENE

INTRODUCTION

In their opposing briefs, New Mexico, Texas and the United States argue that non-state entities are categorically precluded from intervening in original actions in certain instances – if the entities were created by one of the states in the action, or if the action involves an interstate water dispute – and therefore Elephant Butte Irrigation District ("EBID") is categorically precluded from intervening here. The opposing parties also argue that EBID does not have a "compelling interest" in intervening apart from its interest in a "class" with other citizens and creatures of New Mexico, that EBID's interest is represented by either New Mexico or the United States, and therefore EBID does not have the right to intervene for this additional reason.

The opposing parties' first argument – that EBID is categorically precluded from intervening – is inconsistent with this Court's recent decision in *South Carolina v. North Carolina*, 558 U.S. 256 (2010), and earlier decisions, which have adopted a fact-specific standard rather than a categorical rule in determining whether a non-state entity has the right to intervene in an original action.

The opposing parties' second argument – that EBID does not have a "compelling interest" and that its interest is represented by New Mexico or the

United States – wrongly describes EBID's significant interest in this case. EBID is not, as portrayed by the opposing parties, a simple "water user" similarly situated to other water users in New Mexico and Texas, or a "fiscal agent" of the United States. Rather, EBID is responsible for administering the Rio Grande Project in New Mexico, and EBID's administration of the Project determines the amount of Rio Grande water reaching Texas. In administering the Project, EBID diverts Project water from the Rio Grande and delivers it to users in New Mexico, provides for Project return flows to the river that eventually reach Texas, otherwise monitors Project water to ensure that it reaches users in Texas and Mexico, and even physically delivers Project water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and does not serve as a functionary of the United States or carry out Project policies established by New Mexico. In addition, EBID is one of the signatories, along with the United States and a Texas water district, to the contracts that have apportioned Project water – and hence Rio Grande water itself – between New Mexico and Texas. In EBID's view, these contracts, and not the Rio Grande Compact, establish the apportionment of water between New Mexico and Texas. None of the parties in this litigation asserts a similar position, or otherwise represents EBID's interest.

Therefore, EBID has a "compelling interest" that is not represented by any party in this litigation, and is entitled to intervene.

I. ELEPHANT BUTTE IRRIGATION DISTRICT IS NOT CATEGORICALLY PRECLUDED FROM INTERVENING.

The opposing parties and EBID agree that EBID has the burden of demonstrating that it has the right to intervene in this original action. As this Court recently stated in *South Carolina*, a non-state entity seeking to intervene in an original action has "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010), quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam).[1]

The opposing parties and EBID disagree, however, on the nature of the burden that a non-state entity, such as EBID, must sustain. The opposing parties argue that the burden for certain non-state entities – particularly those, like EBID, that have been created by one of the states in the original action

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[1] The *South Carolina* Court described the above-quoted standard as the "general rule" for determining whether a non-state entity has the right to intervene in an original action. *South Carolina*, 558 U.S. at 266. EBID cited this "general rule" in its opening brief. EBID Br. 19. New Mexico asserts that EBID is arguing that the "general rule" "favor[s] intervention by nonstate parties." N.M. Br. 3. EBID made no such contention, and instead merely cited *South Carolina*'s statement that the "general rule" is as described above.

– is so high that they are categorically precluded, or virtually so, from intervening in original actions.

The opposing parties have mischaracterized the nature of the burden that EBID must sustain. This Court in *South Carolina* and other cases has rejected a categorical rule that precludes certain non-state entities from intervening in original actions, and has instead adopted a more flexible, fact-specific standard that considers whether the non-state entity has a "compelling" interest that is not represented by its state. As we explain, EBID meets this more flexible standard and should be allowed to intervene.

A. In *South Carolina* and Other Cases, This Court Has Adopted a Fact-Specific Standard Rather Than a Categorical Rule in Determining Whether a Non-State Entity Can Intervene in an Original Action.

In *South Carolina*, three non-state entities sought to intervene in an original action brought by South Carolina against North Carolina for equitable apportionment of the interstate Catawba River. The three non-state entities were (1) the Catawba River Water Supply Project (CRWSP), a water supply agency that provided water supplies to users in both states; (2) Duke Energy Carolina, LLC ("Duke Energy"), which operated dams and reservoirs in the river and provided electricity to users in both states; and (3) the City of Charlotte ("Charlotte"), which held water rights in the Catawba River and was the

largest user of river water in North Carolina. *South Carolina*, 558 U.S. at 261-262. The *South Carolina* dissenting opinion argued that all non-sovereign entities, including the three entities that sought intervention, should categorically be precluded from intervening in an original action for equitable apportionment of interstate waters, because "[a]n interest in water is an interest shared with other citizens, and is properly pressed or defended by the State." *South Carolina*, 558 U.S. at 279 (Roberts, C.J., dissenting).

The *South Carolina* majority opinion rejected the dissenting opinion's proposed categorical rule and instead adopted a fact-specific standard. The Court majority held that two of the non-state entities, CRWSP and Duke Energy, should be allowed to intervene because they were "bistate entities" that provided water supplies and electricity to users in both states, and thus these entities had "compelling interests" that could not be represented by either state. *South Carolina*, 558 U.S. at 268-273. The Court held that the third non-state entity, Charlotte, should not be allowed to intervene, because Charlotte was simply a water user – albeit the largest water user – of river water in North Carolina, and thus was similarly situated to all other water users in North Carolina; the "magnitude" of Charlotte's interest, the Court stated, "does not distinguish it in kind from other members of the class" of water users in North Carolina. *Id.* at 274-275. Thus, the Court rejected the dissenting opinion's categorical approach and instead examined the interest of each non-state entity to

determine whether it had a compelling interest not represented by the state.

In adopting its fact-specific standard, the *South Carolina* Court cited many factors cited by the opposing parties here – such as "[r]espect for state sovereignty" and the undesirability of allowing a state to be "judicially impeached" by its own subjects – in concluding that the standard for intervention by non-state entities in original actions is "high – and appropriately so." *South Carolina*, 558 U.S. at 267. The Court also stated, however, that the fact that the standard for intervention is "high . . . does not mean that it is insurmountable." *Id.* at 268.[2] In support of its conclusion that the standard is not "insurmountable," the Court cited several cases in which it had allowed non-state entities to intervene in original actions. *Id.* at 264-265, 268.[3] The Court concluded that "[i]t is . . . not a novel proposition to accord party status to a citizen in an original action between States," and the Court "has granted leave, under appropriate circumstances, for non-State entities to

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[2] All three parties opposing EBID's intervention mention the Court's statement that the standard for intervention is "high," Tex. Br. 4; N.M. Br. 3; U.S. Br. 9, but none mentions the Court's following statement that the standard is not "insurmountable."

[3] The cited cases were *Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981), *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922), *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam), and *Arizona v. California*, 460 U.S. 605, 613-614 (1983). *South Carolina*, 558 U.S. at 264-265, 268.

intervene as parties in original actions between States for nearly 90 years." *Id.* at 264. The Court stated that "our practice long has been to allow such intervention [by non-state entities] in compelling circumstances." *Id.* at 268. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981) ("[I]t is not unusual to permit intervention of private parties in original actions," citing *Oklahoma v. Texas*, 258 U.S. 574 (1922)).

Thus, *South Carolina* held that a non-state entity may intervene in an original action if it has a compelling interest not represented by the state, and rejected the dissenting view that a non-sovereign entity should categorically be precluded from intervening in an equitable apportionment action. *South Carolina* indicated that the factors cited by the opposing parties as the basis for their categorical argument – such as "respect of state sovereignty" and the undesirability of allowing non-state entities to "impeach" the home state's judgment – warrant placing a "burden" on the non-state entity to show that it meets the standard for intervention, but do not warrant categorical preclusion of the entity's right to intervene if it meets this standard. *South Carolina* thus adopted a flexible, fact-specific standard in determining the right to intervene, and rejected the categorical approach urged by the opposing parties here.

B. The Opposing Parties' Argument That EBID Is Categorically Precluded From Intervening Because It Was Created by the State of New Mexico Is Inconsistent With *South Carolina* and Other Supreme Court Decisions.

New Mexico and the United States argue that EBID is categorically precluded from intervening because it was created under the laws of New Mexico and therefore New Mexico represents EBID's interests in a *parens patriae* capacity. New Mexico argues that EBID is a "creature of the State of New Mexico" and that this Court has "consistently held that an entity created under state law such as EBID . . . does not meet the high standard of a compelling interest for intervention. . . ." N.M. Br. 6. If EBID is allowed to intervene, New Mexico argues, EBID will be able to "impeach its home state – something that this Court has said it cannot do." *Id.* at 22. The United States echoes New Mexico's argument, asserting that New Mexico represents EBID's interests because EBID is "a quasi-government entity created under New Mexico law," U.S. Br. 10, and that EBID's intervention would result in "precisely the type of 'impeach[ment] . . . by its own subjects' that is offensive to State sovereignty and inadequate to warrant intervention by a wholly intrastate entity." *Id.* at 11.

Contrary to New Mexico's and the United States' argument, this Court has allowed non-state entities created by one of the states in an original action to intervene in the action, if the entities demonstrate

that they have a "compelling interest" not represented by its state. Thus, the Court has rejected any suggestion that such entities are categorically precluded from intervening because they may "impeach" the home state's judgment. In *South Carolina* itself, this Court granted intervention to a non-state entity, CRWSP, that, as described by the Court, was a "municipal entity" created by the states. *South Carolina*, 558 U.S. at 269. Thus, *South Carolina* allowed a non-state entity to intervene even though it was created by the states.

Similarly, in *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam), this Court allowed the City of Port Arthur, Texas, to intervene in an original action in which the City's home state, Texas, was a party. Thus, *Louisiana* granted intervention to a non-state entity that was created by one of the states in the action.

In *Arizona v. California*, 460 U.S. 605 (1983), this Court allowed several Indian tribes to intervene in an original action for apportionment of the Colorado River even though the tribes' interests were represented by the United States, which had intervened in the action, thus indicating that a non-state entity may intervene in an original action even though its interest is represented by a sovereign party in the action. *Arizona*, 460 U.S. at 613-614.[4]

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[4] The United States argues that the Indian tribes were allowed to intervene in *Arizona* because they were "sovereign

(Continued on following page)

In *South Carolina*, this Court, citing its decisions in *Arizona v. California* and *Texas v. Louisiana*,

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entities," and that *Arizona* does not support EBID's intervention because EBID is not a "sovereign entity." U.S. Br. 13. The United States' interpretation of *Arizona* may be supported by the *South Carolina* dissenting opinion, which argued that "the Indian Tribes were allowed to intervene because they were sovereign entities." *South Carolina*, 558 U.S. at 283 (Roberts, C.J., dissenting). The *South Carolina* majority opinion, however, did not suggest that the Indian tribes in *Arizona* were allowed to intervene because they were sovereign entities, and did not mention the tribes' status as sovereign entities. Rather, the *South Carolina* majority opinion stated that the Indian tribes in *Arizona* were allowed to intervene "notwithstanding the Tribes' simultaneous representation by the United States," and that *Arizona* demonstrated that "the Court found compelling interests that warranted allowing nonstate entities to intervene in original actions in which the intervenors were nominally represented by sovereign parties." *South Carolina*, 558 U.S. at 268. The *South Carolina* majority opinion's analysis of *Arizona* is consistent with *Arizona* itself. *Arizona* did not suggest that the Indian tribes should be allowed to intervene because they were sovereign entities, and *Arizona* did not even mention the tribes' sovereign status. Instead, *Arizona* held that the Indian tribes' intervention would not violate the Eleventh Amendment – and thus they should be allowed to intervene – because (1) the "[w]ater rights claims for the Tribes were brought by the United States" and the Eleventh Amendment does not "prevent a State's being sued by the United States," (2) "[t]he Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States," and (3) the tribes are entitled "to take their place as independent qualified members of the body politic." *Arizona*, 460 U.S. at 614-615 (citation and internal quotation marks omitted). Thus, *Arizona* is not distinguishable, as claimed by the United States, because the Indian tribes were "sovereign entities."

stated that the Court in those cases "found compelling interests that warranted allowing nonstate entities to intervene in original actions in which the intervenors were nominally represented by sovereign entities." *South Carolina*, 558 U.S. at 268.

Indeed, this Court's standard for intervention by non-state entities in original actions, as described in *South Carolina* and *New Jersey*, authorizes intervention by a non-state entity if it has a "compelling interest" that is apart from its interest "in a class with all other citizens and creatures of the state." *South Carolina*, 558 U.S. at 267; *New Jersey v. New York*, 345 U.S. 369, 373 (1953). Thus, the Court's standard for intervention authorizes non-state entities to intervene even though they may be "creatures" as opposed to "other citizens" of the state, as long as they meet this Court's fact-specific standard for intervention.

In sum, this Court has held in several cases that a non-state entity may intervene in an original action even though the entity was created by one of the states in the action, if the entity demonstrates that it has a compelling interest not represented by its state. As a matter of logic and policy, a non-state entity that has a compelling interest not represented by its state should be allowed to intervene in an original action in which its state is a party; otherwise, the entity's interest, even though compelling, would not be represented. And, if the entity is allowed to intervene because the state does not represent its interest, the entity may properly assert all arguments necessary to

protect its interest, even though this may result in "impeachment" of the state's judgment; otherwise, there would be no point in the entity's intervention. Such is the logic and policy that supports this Court's flexible, fact-specific standard for intervention in *South Carolina* and other cases.

C. Texas' Argument That Non-Sovereign, Non-Bistate Entities Are Categorically Precluded From Intervening in Original Interstate Water Disputes Is Misplaced.

Texas, citing the *South Carolina* dissenting opinion, argues that this Court has "a long history of 'rejecting attempts by nonsovereign entities' to intervene in interstate water disputes." Tex. Br. 5. Texas claims that this Court has granted intervention in an "interstate water dispute" to a party other than the United States or an Indian tribe in only one case, *i.e.*, *South Carolina* itself, where the Court granted intervention to entities that had "direct bistate interests." *Id.* at 5-7. Texas concludes that since EBID is not a bistate entity, it does not have the right to intervene. *Id.* at 7-10.[5] In effect, Texas argues that non-sovereign, non-bistate entities, including EBID, are

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[5] As explained later, EBID has bistate interests and not solely intrastate interests because, in administering the Rio Grande Project, EBID monitors Project water to ensure that the water reaches users in Texas and Mexico, and EBID physically delivers Project water to users in Texas. *See* pages 21-22, *supra*.

categorically precluded, or virtually so, from intervening in original interstate water disputes.[6]

Contrary to Texas' argument, this Court in *South Carolina* did not suggest that a different standard for intervention applies in interstate water disputes than other kinds of interstate disputes. Rather, *South Carolina* applied the same standard for intervention in the interstate water dispute in that case that it applies in other cases, namely whether the non-state entity has a compelling interest not represented by its state. Also, *South Carolina* did not suggest that only a non-state entity that has bistate interests can intervene in an interstate water dispute. Rather, *South Carolina* held that the non-state entities in that case, CRWSP and Duke Energy, had "compelling interests" and were allowed to intervene because their interests were bistate. In other words, all bistate interests may be compelling, but all compelling interests are not necessarily bistate. A bistate

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[6] New Mexico makes a similar argument, citing this Court's decisions in *Nebraska v. Wyoming*, 515 U.S. 1, 22-23 (1995), *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), and *Tarrant Reg'l Water Dist. v. Hermann*, ___ U.S. ___, 133 S.Ct. 2120, 2132-2133 (2013), in arguing that the states speak for their citizens in interstate water disputes involving equitable apportionment claims or compact claims, and that such disputes involve matters "rooted in state sovereignty." N.M. Br. 4. This Court in *South Carolina*, however, authorized intervention by two non-state entities in an equitable apportionment action notwithstanding the Court's "[r]espect for state sovereignty" because the entities satisfied the Court's fact-specific "compelling interest" standard. *South Carolina*, 558 U.S. at 267, 268-273.

interest is one way – but not the only way – for a non-state entity to satisfy the "compelling interest" standard.

The *South Carolina* dissenting opinion cited by Texas argued that non-state entities should categorically be precluded from intervening in original actions for equitable apportionment of interstate waters, because a non-state entity's share of the interstate waters is subsumed within the state's equitably apportioned share, and the state represents the interests of all of its citizens as *parens patriae* in determining the state's equitably apportioned share. *South Carolina*, 558 U.S. at 279-280 (Roberts, C.J., dissenting), citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938).[7] Apart from the fact that the *South Carolina* majority rejected the dissenting argument, Texas' action here does not seek an equitable apportionment of interstate waters. Instead, Texas alleges that the Rio Grande Compact apportioned Rio Grande waters between New Mexico and Texas based on conditions prevailing in 1938, and Texas seeks to enforce its alleged rights under the Compact. Thus, this action presents an issue of compact interpretation, not

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[7] Under the equitable apportionment doctrine, which is a federal common law doctrine fashioned by this Court, this Court considers "all relevant factors" in arriving at a "just and equitable apportionment" of an interstate stream. *South Carolina*, 558 U.S. at 271-272; *see Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *Nebraska v. Wyoming*, 325 U.S. 589, 599, 616-620 (1945); *Wyoming v. Colorado*, 259 U.S. 419, 458-460 (1922).

equitable apportionment. The *South Carolina* dissenting opinion – which was rejected by the Court majority – does not support Texas' argument because this is not an equitable apportionment action.[8]

II. ELEPHANT BUTTE IRRIGATION DISTRICT HAS A "COMPELLING INTEREST" APART FROM ITS INTEREST IN A "CLASS" WITH "ALL OTHER CITIZENS AND CREATURES" OF NEW MEXICO.

The parties opposing EBID's intervention argue that EBID is a "water user" similarly situated to other water users in New Mexico and Texas, and thus

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[8] As explained later, although Texas' complaint alleges that the Rio Grande Compact apportioned Rio Grande water between Texas and New Mexico and that EBID was not a party to the Compact, EBID was a party to the contracts that EBID argues apportioned the water between the two states, and the contracts are relevant in explaining why the Compact did not apportion the water; thus, EBID has a compelling interest in intervening even though it was not a party to the Compact. *See* pages 24-30, *infra*. New Mexico argues that a non-state entity has a lesser right to intervene in an interstate compact dispute, as here, than an equitable apportionment action, because an interstate compact dispute involves an interpretation of a compact signed by the state, and the state is the only proper entity to interpret the compact. N.M. Br. 20-21. Regardless of whether, in the abstract, a non-state entity generally has a lesser right to intervene in an interstate compact dispute, EBID has a compelling interest in intervening here because EBID is a party to the contracts that apportioned Rio Grande Project water between the two states and the contracts are relevant in explaining why the Compact did not apportion the water. *See* pages 24-30, *infra*.

EBID does not have a "compelling" or "unique" interest in intervening. Tex. Br. 8-9; N.M. Br. 13-14, 17-18; U.S. Br. 12. They argue that since EBID is a water user, EBID's interest is like that of the Cities of Philadelphia and Charlotte in *New Jersey* and *South Carolina*, which were denied intervention because they were similarly situated to other entities that had water rights in the interstate rivers. N.M. Br. 8-9; U.S. Br. 10. The opposing parties argue that EBID's intervention would potentially open the door to intervention by other water users in New Mexico and Texas, N.M. Br. 13; U.S. Br. 14, and thus the Court would become involved in an "intramural dispute" among water users in the two states. N.M. Br. 23; U.S. Br. 12; Tex. Br. 10. The United States argues that EBID is a mere "fiscal agent" of the United States in its operation of the Rio Grande Project, and that EBID's operational responsibilities do not provide a basis for intervention. U.S. Br. 6. The opposing parties conclude that EBID does not have a "compelling interest" apart from its interest in a "class" with similarly-situated water users, and therefore does not have the right to intervene.

Contrary to the opposing parties' arguments, EBID is not a "water user" similarly situated to other water users in New Mexico and Texas. In fact, EBID does not "use" water at all. Rather, EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project's distribution and drainage facilities in New Mexico. In that capacity, EBID delivers Project water for irrigation use in New

Mexico, provides for Project return flows to the Rio Grande, monitors Project water to ensure that it reaches users in Texas and Mexico, and even physically delivers Project water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and is not a functionary of the United States in administering the Project. Further, EBID has entered into contracts with the United States and a Texas water district that have apportioned Project water between New Mexico and Texas, and EBID exercised its independent authority and judgment in entering into the contracts and establishing the apportionment. Because of its unique responsibilities in administering the Project and signing the contracts that have apportioned the water, EBID has a "compelling interest" in intervention apart from its interest in a "class" of "all other citizens and creatures of the state." *South Carolina*, 558 U.S. at 267. Indeed, because of its unique responsibilities, there is no "class" in New Mexico to which any other entity like EBID belongs. EBID is unlike the Cities of Philadelphia and Charlotte in *New Jersey* and *South Carolina*, which were denied intervention because they belonged to a "class" of similarly-situated water users whose interests were represented by their states.

A. EBID Has a "Compelling Interest" Because It Administers the Rio Grande Project in New Mexico, and Exercises Its Independent Authority and Judgment in Administering the Project.

Although EBID described its unique responsibilities in administering the Rio Grande Project in its opening brief, EBID Br. 3-4, 6-7, 11-13, the parties opposing EBID's intervention – although asserting that EBID is a "water user," *e.g.*, Tex. Br. 8-9; N.M. Br. 13-14 – did not mention EBID's unique responsibilities in administering the Project, or otherwise argue that EBID's unique responsibilities are an insufficient basis for intervention.

As explained in EBID's opening brief, EBID was created pursuant to a New Mexico statute for the purpose of "cooperat[ing]" with the United States in administering the federal Rio Grande Project in New Mexico "under the federal reclamation law, or other federal laws." N.M. Stat. §§ 73-10-1 *et seq.*; EBID Br. 3.[9] Thus, EBID is required to apply federal law,

[9] Under the New Mexico statute, EBID is authorized to "cooperat[e]" with the United States in providing for irrigation of lands "under the federal reclamation law, or other federal laws," N.M. Stat. § 73-10-1; to enter into "all necessary contracts" to establish rules and regulations for "the distribution and use of water" on the lands, *id.* at § 73-10-16; to "unite" with an irrigation district of an adjoining state to establish "a system of irrigation and drainage works" for irrigation of land, *id.* at § 73-10-23; and to enter into a "contract" with the United States for the purpose of "cooperation" with the United States "under the federal reclamation law or other federal laws," *id.* at § 73-11-53.

including the federal reclamation laws, in carrying out its functions. In 1979, EBID entered into a Take-over Contract with the United States and the Texas water district that administers the Project in Texas, the El Paso County Water Improvement District No. 1 (EPCWID). EBID Br. 12-13. Under the Takeover Contract, the United States transferred to EBID the responsibility for operating and maintaining the Project's entire distribution and drainage system in New Mexico. App. 1.[10] As a result of the transfer, many federal employees who had operated the Project on behalf of the United States were transferred to EBID, where they continued performing the same functions as EBID employees. App. 2-3. Under a 1989 contract between the United States, EBID and EPCWID, the United States transferred to EBID the responsibility for operating and maintaining the three diversion dams in New Mexico – the Percha, Leasburg and Mesilla Dams – that divert Project water into EBID-operated canals and laterals for irrigation use in New Mexico. App. 3. After EBID repaid New Mexico's share of the Project construction costs, Congress in 1992 authorized the Secretary of the Interior to transfer to EBID the title to Project facilities in New Mexico, including the canals and drainage systems. Pub. L. 102-575, 106 Stat. 4705

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[10] The Project functions described in this portion of this brief are based on the declaration of EBID's General Manager, Gehrig Lee Esslinger, which is attached as Appendix 1 to this brief.

(1992); EBID Br. 13. In 1996, the Secretary of the Interior issued deeds that transferred title to these facilities to EBID. App. 4; EBID Br. 13. Thus, EBID – not the United States – owns and operates the Project distribution and drainage facilities in New Mexico.

As a result of these statutes, contracts and deeds, the Rio Grande Project is administered in New Mexico as follows: The United States owns and operates the Elephant Butte and Caballo dams and reservoirs that store Project water, and the United States and the two water districts, EBID and EPCWID, jointly determine the amount of stored water available to the districts. App. 5. The water districts themselves, however, determine when and how much water is released from storage for the districts; the districts provide this notification to the federal Project operators, and the federal operators release the water as requested by the districts. App. 5, 7. The water, once released, flows downstream until it reaches the three diversion dams in New Mexico, the Percha, Leasburg and Mesilla Dams. App. 5. EBID operates the three diversion dams, and determines when and how much water is diverted from the dams. App. 3, 5. The water, once diverted by EBID at the diversion dams, flows through EBID canals and laterals to farmers in New Mexico, who use the water for irrigation; EBID owns and operates the canals and laterals, and makes all decisions concerning timing and amount of water deliveries through these facilities. App. 5. A portion of the water not used for irrigation is captured by drainage facilities and returned to the Rio Grande for

further downstream use; EBID owns and operates the drainage facilities that provide for the return flows to the river. App. 6.

EBID also plays a role in ensuring the delivery of Project water to users in Texas and Mexico. EBID operates the three diversion dams in New Mexico not only to provide water for irrigation use in New Mexico, but also to ensure delivery of Project water to downstream users in Texas and New Mexico, based on delivery orders from districts in Texas and Mexico. App. 3, 4. For example, when EPCWID orders a specific quantity of Project water for use in Texas, the United States releases the water from the upstream reservoirs and EBID monitors the water as it flows downstream through the EBID-operated diversion dams, to ensure that the designated quantity of water reaches EPCWID's facilities in Texas. App. 3.

The most downstream of the three diversion dams that EBID operates, the Mesilla Dam, diverts Project water for use in both New Mexico and Texas. App. 6. When EPCWID orders a specific quantity of Project water for use in Texas and the United States releases the water from the upstream reservoirs, EBID monitors the water as it flows downstream past the first two diversion dams, and EBID may then divert the water at the Mesilla Dam in order to transport it through EBID canals to EPCWID's system for use in Texas. App. 3, 7-8. Thus, EBID diverts Project water at the Mesilla Dam for users in both New Mexico and Texas.

Indeed, EBID itself physically delivers a portion of Project water to users in Texas. Under a 1995 contract with EPCWID, EBID delivers Project water to Texas farmers in two units of the EPCWID system – Units 6B and 6C – that cannot be reached by EPCWID facilities; under the contract, EBID delivers water to 2,400 acres in Unit 6B and 1,400 acres in Unit 6C, for a total of 3,400 acres. App. 6-7. In delivering the water, EBID employees drive in EBID vehicles across the New Mexico-Texas state line into Texas, and operate turnouts in Texas that deliver the water to these EPCWID units. App. 7. Thus, EBID physically delivers Project water to users in both New Mexico and Texas.

Since EBID administers the Project to ensure water deliveries not only to New Mexico but also to Texas and Mexico, and physically delivers Project water to users in Texas, EBID serves bistate interests and not solely intrastate interests in administering the Project. The opposing parties' assertion that EBID does not serve bistate interests and does not deliver Project water to lands outside New Mexico, N.M. Br. 6, 11-12; Tex. Br. 9; U.S. Br. 11-12, is incorrect. In *South Carolina,* the Supreme Court granted intervention to two non-state entities, CRSWP and Duke Energy, because they served bistate interests. *South Carolina,* 558 U.S. at 268-273. Since EBID serves bistate interests, *South Carolina* supports EBID's right to intervene.

In sum, EBID administers the Rio Grande Project in New Mexico, provides for water deliveries in

New Mexico, provides for return flows to the Rio Grande, monitors the river flows to ensure water deliveries in Texas and Mexico, and physically delivers water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and is not subject to regulatory oversight or review by the United States. The United States' assertions that EBID is simply a "fiscal agent" of the United States, U.S. Br. 6, and merely "assists" the United States in administering the Project, U.S. Br. 9, is incorrect.[11] The United States was granted intervention – even though it was not a party to the Rio Grande Compact that forms the basis of Texas' complaint – because of its role in administering the Rio Grande Project. Since EBID administers the Rio Grande Project in New Mexico, the rationale for granting the United States' intervention supports EBID's right to intervene.

In its complaint, Texas alleges that New Mexico is violating Texas' rights under the Rio Grande Compact by allowing Rio Grande water that has been apportioned to Texas under the Compact to be "intercepted and used" in New Mexico. Tex. Compl. ¶ 4. EBID administers the Project facilities that divert Rio Grande water for use in New Mexico and provide

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[11] The United States' assertion that the United States "determines" how much water is allocated between EBID and EPCWID, U.S. Br. 10, 13, is also incorrect, to the extent it implies that the United States makes these decisions unilaterally rather than jointly with EBID and EPCWID.

for return flows to the river, and these are the facilities that, under Texas' theory, cause Rio Grande water apportioned to Texas to be "intercepted and used" in New Mexico. Since EBID operates the Project facilities that cause the alleged interception of which Texas complains, EBID has a compelling and unique interest in intervening.

B. EBID Has a "Compelling Interest" Because It Is a Party to the Contracts That Apportion, and Have Historically Apportioned, Rio Grande Water Between New Mexico and Texas.

Apart from its administration of the Rio Grande Project, EBID also has a compelling interest in intervening because it is a party to the contracts that apportion, and have historically apportioned, Project water – and hence Rio Grande water itself – between New Mexico and Texas.

As EBID argued in its opening brief, the Compact did not apportion Rio Grande water between New Mexico and Texas. EBID Br. 30-32. The Compact required that Colorado deliver Rio Grande water to New Mexico and that New Mexico deliver water to the Rio Grande Project, but did not require that New Mexico deliver water to Texas at the New Mexico-Texas state line. *Id.* at 11-12. Thus, the Compact apportioned Rio Grande water between Colorado and New Mexico and between New Mexico and the Project, but did not apportion Project water itself between

New Mexico and Texas. *Id.* at 30-32. The apparent reason that the Compact did not apportion the water between New Mexico and Texas is because the Compact negotiators were aware that the United States, EBID and EPCWID had already signed the 1938 contract apportioning Project water between New Mexico and Texas. *Id.* at 33. Since the three entities had signed a contract apportioning the water, there was no need for the Compact to address the subject. The Rio Grande Compact is thus different from many other interstate compacts apportioning interstate waters, which apportion all such waters between the signatory states.

Under the 1938 contract signed by the United States, EBID and EPCWID, each acre of the Project receives the same amount of Project water as any other acre. EBID Br. 11-12. Since 57% of the Project lands are in New Mexico and 43% are in Texas, the apportionment of Project water between the two states is based on the same ratio. *Id.* In 2008, the United States, EBID and EPCWID entered into the Operating Agreement that adjusted the rights in the 1938 contract by, first, providing for annual carryover storage and, second, changing the baseline for groundwater pumping in New Mexico from 1938, when the contract was signed, to the drought years of 1951-1978. EBID Br. 16-17. Thus, the 1938 contract apportioned Project water between New Mexico and Texas, and the 2008 Operating Agreement modified the apportionment based on current conditions.

The apportionment of Project water established in the contracts has historically determined the apportionment of Rio Grande Project water itself between New Mexico and Texas, because the amount of Project water reaching Texas is the same as the amount of Rio Grande water reaching Texas. That is, the amount of Rio Grande water reaching Texas is the amount of Project water released from the upstream reservoirs, less river losses and Project water diverted for use in New Mexico and not returned to the river. Since the apportionment of Rio Grande water has been determined by the apportionment of Project water established in the contracts to which EBID is a signatory, EBID has a compelling interest in intervening in any action involving an apportionment of Rio Grande water between New Mexico and Texas.

Indeed, Texas acknowledges that the apportionment of Rio Grande water is based, at least in part, on contracts to which EBID is a signatory. In its motion to file its complaint, Texas asserted that the apportionment of Rio Grande water established by the Rio Grande Compact "incorporates the basic assumption of the authorization, construction and operation of the Rio Grande Project by the United States," Tex. Br. in Support of Mot. for Leave to File Compl., at 10, and that "water is allocated and belongs to Rio Grande Project beneficiaries . . . based upon allocations derived from the Rio Grande Project authorization and *relevant contractual arrangements*."

Id. at 2-3 (emphasis added).[12] Since Texas' claimed apportionment of water under the Compact is based, at least in part, on "relevant contractual arrangements" to which EBID is a party, EBID has a compelling interest in intervening under Texas' theory of the case.

EBID's interest in intervening is more compelling than that of the two bistate entities, CRWSP and Duke Energy, that were allowed to intervene in *South Carolina*. In *South Carolina*, the bistate entities were allowed to intervene because they had bistate interests not represented by their states, not because their intervention was necessary to determine the apportionment of the interstate river. In the instant case, by contrast, EBID's activities, both in administering the Project and signing the contracts that apportioned the water, may significantly affect if not determine the outcome of the litigation, particularly if the Court determines, as EBID argues, that the contracts and not the Compact apportion the water.

Although the historical apportionment of Rio Grande water has been established by the contracts signed by the United States, EBID and EPCWID, none of the parties in this action argues that the apportionment of water was established by the

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[12] Similarly, Texas stated in its opposition to EBID's intervention motion that under its theory "[w]ater would be stored, released, and delivered to Texas subject to Reclamation's contracts in New Mexico, *i.e.*, EBID's contract, and the United State's [sic] treaty obligation to Mexico." Tex. Br. 14.

contracts rather than the Compact. EBID, if allowed to intervene, would be the only party making this argument. This demonstrates, again, that EBID has a compelling interest not represented by any of the parties.

C. The Fact That EBID Was Not a Party to the Rio Grande Compact Is Not Relevant Concerning EBID's Right to Intervene.

The opposing parties contend that EBID's administration of the Rio Grande Project is irrelevant, because this case involves an interpretation of the Rio Grande Compact and EBID was not a party to the Compact and has no rights or obligations under the Compact. N.M. Br. 12-13, 15-17; Tex. Br. 8-9; U.S. Br. 9-10; *see* note 8, *supra*. However, the contracts signed by the United States, EBID and EPCWID for apportionment of Project water between New Mexico and Texas are relevant to the question whether the Compact apportioned the water between the states, and, since EBID is a party to the contracts, it has a compelling interest in intervening even though it was not a party to the Compact.

As explained above, the Rio Grande Compact did not apportion Rio Grande water between New Mexico and Texas, because the United States, EBID and EPCWID had already entered into the 1938 contract that apportioned Project water between the two states; the Compact did not address the apportionment issue

because the 1938 contract had already addressed the issue. *See* pages 24-25, *supra*. The goal of the Compact negotiators was to ensure that a certain quantity of Rio Grande water reach the Project, not to ensure that a certain quantity of water reach Texas, a subject that had already been addressed in the contract. *Id.* If the Compact had apportioned Rio Grande water between the states, as Texas contends, the Compact apportionment would have superseded the apportionment established in the contracts, because the Compact was approved by Congress and hence is federal law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Historically, however, the apportionment established in the contracts have been followed by the United States and the two water districts in administering the Rio Grande Project, and by users in New Mexico and Texas who have received deliveries of Project water. This further demonstrates that the contracts and not the Compact apportioned the water between the two states.

Thus, the contracts signed by the United States, EBID and EPCWID that apportioned the water are relevant in explaining why the Compact itself did not apportion the water, and EBID, as a signatory to the contracts, has a compelling interest in intervening even though it was not a party to the Compact. EBID's intervention would assist the Court in understanding the relationship between the Compact and the contracts, which provides a further basis for EBID's intervention. *See Maryland v. Louisiana,* 451 U.S. 725, 745 n. 1 (1981) (authorizing intervention in

original action by pipeline companies that were liable for payment of Louisiana's tax "in the interest of a full exposition of the issues").

D. EBID's Intervention Would Not Potentially Allow Intervention by Numerous Water Users in New Mexico and Texas.

Since EBID has a unique interest in this case – in administering the Rio Grande Project in New Mexico and participating in the contracting process that established the historical apportionment of water – EBID is unlike the numerous "water users" in New Mexico and Texas that the opposing parties claim are similarly situated to EBID and would potentially be allowed to intervene if EBID is granted intervention. Tex. Br. 8-9; N.M. Br. 13-14; U.S. Br. 12. Thus, EBID's intervention would not pave the way for intervention by numerous water districts and users in the two states. The only entity that might have an interest comparable to EBID's interest, and that might be allowed to intervene if EBID intervenes, is EPCWID, which administers the Rio Grande Project in Texas and is a signatory to the 2008 Operating Agreement. To date, however, EPCWID has not sought intervention. Even if EPCWID seeks and obtains intervention, there are no other comparable entities in Texas or New Mexico that might be allowed to intervene on the basis of EBID's and EPCWID's intervention.

III. ELEPHANT BUTTE IRRIGATION DISTRICT'S INTEREST IS NOT REPRESENTED BY ANY PARTY.

The opposing parties argue that EBID's interest is represented by New Mexico. N.M. Br. 19-23; Tex. Br. 10-14; U.S. Br. 10-11. New Mexico contends that since EBID was "created" under New Mexico law, EBID "[i]n carrying out its statutory mission . . . carries out an interest of the State of New Mexico," and thus the interests of EBID and New Mexico are "aligned." N.M. Br. 22. The United States and Texas contend that – to the extent that New Mexico may not represent EBID's interest – EBID's interest is represented by the United States, which is responsible for administering the Rio Grande Project and ensuring its integrity and feasibility. U.S. Br. 13; Tex. Br. 10-14. None of the parties contends that EBID's interest is represented by Texas or Colorado.

Contrary to the opposing parties' arguments, neither New Mexico nor the United States represents EBID's interest.

A. New Mexico Does Not Represent EBID's Interest.

Although EBID was created under New Mexico law, New Mexico does not represent EBID's interest. EBID administers the Rio Grande Project in New Mexico, which controls the flow of Rio Grande water to Texas. Under its enabling act, EBID is required to cooperate with the United States in carrying out

Project functions "under the federal reclamation law, or other federal laws." N.M. Stat. § 73-10-1. Thus, EBID is required to fulfill the functions of a federal project created by Congress, and to comply with federal law in doing so. EBID is a hybrid entity, because it was created under state law but is mandated to fulfill the purposes of a federal project under federal law.

New Mexico, on the other hand, does not have any statutory authority or responsibility relating to administration of the Rio Grande Project in New Mexico, and does not exercise any authority or control over EBID in its administration of the Project. On the contrary, New Mexico disclaims any authority or responsibility for administration of the Project, or for ensuring that Project water reaches Texas. In opposing Texas' motion to file its complaint, New Mexico contended that its only obligation is to deliver Rio Grande water to the Project, and that, once the water is delivered to the Project, New Mexico has no further obligation to deliver or ensure the delivery of Project water to Texas, or to avoid "depletions" of the water before it reaches Texas.[13] Since New Mexico disclaims

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[13] In opposing Texas' motion for leave to file its complaint, New Mexico asserted that the Compact does not require New Mexico "to deliver water to Texas below Elephant Butte Reservoir," N.M. Br. in Opp. to Tex. Mot. for Leave to File Compl. 14; "does not create an obligation of the State of New Mexico to deliver water to the State of Texas," *id.* at 13; and "does not require New Mexico to avoid additional depletions below Elephant Butte Reservoir," *id.* at 20.

any authority or responsibility to administer the Project or ensure that Project water reaches Texas, New Mexico does not represent the interest of EBID, which is responsible for administering the Project and ensuring that Project water reaches Texas.

New Mexico thus takes divergent positions concerning its authority and responsibility for the Project's administration in its oppositions to Texas' motion to file its complaint and EBID's motion to intervene. In opposing Texas' motion to file its complaint, New Mexico disclaimed any responsibility concerning administration of the Project in New Mexico, or to ensure that Project water reaches Texas. *See* note 13, *supra*. In opposing EBID's motion to intervene, however, New Mexico claims to represent the interest of EBID, which is required to administer the Project and ensure that Project water reaches Texas. New Mexico's divergent positions concerning its authority and responsibility for the Project's administration undermines its claim that it represents EBID's interest.

Additionally, EBID was a party to the 1938 contract that apportioned Rio Grande water and the 2008 Operating Agreement that modified the apportionment, and New Mexico was not a party to either of these agreements. EBID exercised its independent authority and judgment in signing the agreements, and New Mexico did not exercise any authority or control over EBID in its decision to sign the agreements. Thus, while EBID participated in the contracting process that apportioned water between New

Mexico and Texas, New Mexico did not participate in this process.

Also, EBID and New Mexico take divergent positions on the validity of the 2008 Operating Agreement, which modified the 1938 contract that apportioned Rio Grande Project water between New Mexico and Texas. EBID, which signed the 2008 Operating Agreement, believes that the agreement provides a fair and equitable apportionment of Project water based on current conditions, and is valid. New Mexico, which did not sign the agreement, believes that the agreement is not valid, and has brought an action, currently pending, to overturn the agreement. *State of New Mexico v. United States, et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011); EBID Br. 25. Obviously New Mexico does not represent EBID's interest concerning whether the Operating Agreement provides a fair and equitable apportionment of Project water between the states.

EBID and New Mexico also take divergent positions on whether Project return flows resulting from drainage and seepage belong to the Project or instead are public waters subject to appropriation under New Mexico law. EBID believes that the return flows belong to the Project because they are generated by the Project and historically have been re-diverted and used by the Project, but New Mexico apparently believes that the return flows are public waters subject to appropriation under New Mexico law. EBID Br. 26. EBID also believes that the allocation of Project waters is governed by federal law, and New

Mexico believes that the allocation is governed by New Mexico law. *Id.*[14]

For these reasons, New Mexico does not represent EBID's interest.

B. The United States Does Not Represent EBID's Interest.

The United States does not represent EBID's interest. EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project distribution and drainage facilities in New Mexico. The United States does not exercise authority or control over EBID in its administration of these functions. EBID – after determining when and how much water is released from storage for use in New Mexico – operates the diversion dams that divert water from the river in New Mexico, owns and operates the canals and laterals that deliver the water to farmers, owns and operates the drainage facilities

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[14] EBID argued in its motion that since EBID asserts different arguments than the parties, EBID's intervention "would help the Court to better understand the complicated issues raised in this case." EBID Br. 29. The opposing parties argue that this is an inadequate ground for intervention. U.S. Br. 15; N.M. Br. 21. This Court in *Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981), however, granted intervention to pipeline companies that were liable for paying the disputed Louisiana tax "in the interest of full exposition of the issues." Since EBID's intervention would contribute to a "full exposition of the issues," this factor, among others, supports EBID's right to intervene.

that provide for return flows to the river, monitors Project water to ensure that it reaches users in Texas and Mexico, and physically delivers water to users in Texas. *See* pages 20-22, *supra*; EBID Br. 5-6, 12-13. In performing these functions, EBID exercises its independent authority and judgment, and the United States does not exercise authority or control over EBID. Although the Rio Grande Project was authorized by Congress, Congress authorized the Secretary of the Interior to transfer the Project facilities to EBID after EBID repaid New Mexico's share of the Project costs, and the Secretary, acting pursuant to this congressional authorization, transferred title to the Project facilities to EBID, including the canals and drainage systems. *See* pages 19-20, *supra*; EBID Br. 12-13. These Project facilities are owned and operated by EBID, and the United States has no authority or control over EBID in its operation of the facilities. Although the United States is responsible for ensuring the Project's integrity and feasibility, EBID owns and operates the Project distribution and drainage facilities in New Mexico and thus is also responsible for ensuring the Project's integrity and feasibility. The responsibility to protect the Project's integrity and feasibility in New Mexico belongs to both the United States and EBID, and not solely to the United States.

Additionally, the United States, EBID and EPCWID signed the 1938 apportionment contract that apportioned Project water between New Mexico and Texas, and these entities also signed the 2008

Operating Agreement that modified the 1938 contract. *See* pages 24-25, *supra*; EBID Br. 11-12, 16-17. Thus, the United States, EBID and EPCWID have jointly established the apportionment of Project water through the contracting process, and the apportionment was not established by the United States unilaterally. In signing these agreements, EBID exercised its independent authority and judgment, and the United States did not exercise authority or control over EBID.

Further, the United States and EBID take divergent positions on significant issues in this case. The United States apparently supports Texas' claim that the Rio Grande Compact apportioned Rio Grande water between Texas and New Mexico based on 1938 conditions. EBID, on the other hand, believes that the Compact did not apportion the water, and that the apportionment was instead established by the 1938 contract as modified by the 2008 Operating Agreement. EBID Br. 30-35. Also, the United States and EBID disagree on whether the "hydrologically connected groundwater" of the Rio Grande basin belongs to the Project or instead is public water subject to appropriation under New Mexico law. The United States contends that the hydrologically connected groundwater belongs to the Project, and EBID contends that any Project water that percolates into the ground and becomes part of the aquifer does not belong to the Project and instead is public water

subject to appropriation under New Mexico law. EBID Br. 37-38.[15]

For these reasons, the United States does not represent EBID's interest.

IV. ELEPHANT BUTTE IRRIGATION DISTRICT SHOULD NOT BE DENIED INTERVENTION BECAUSE IT DID NOT INCLUDE A COMPLAINT OR ANSWER IN ITS MOTION FOR LEAVE TO INTERVENE.

Texas argues that EBID's motion to intervene suffers from "fatal procedural defects" because EBID's motion does not include a "pleading," in the form of a complaint or answer in intervention. Tex. Br. 3-4. Supreme Court Rule 17.2 provides that the form of pleadings and motions in original actions follows the

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[15] The United States argues that EBID can present its arguments as an amicus, which weighs against its right to intervene. U.S. Br. 14-15. This Court has held, however, that a non-state entity that has a compelling interest not represented by its state may intervene in an original action in which the state is a party. *South Carolina*, 558 U.S. 267. Thus, a non-state entity that meets this standard is entitled to intervene irrespective of whether it might otherwise present its views as an amicus. If EBID is allowed to intervene, EBID would be able to participate as a party – and thus to produce evidence and witnesses, cross-examine witnesses, and file or oppose exceptions from the Special Master's recommendations – in support of its legal position, which is not represented by any of the parties. Thus, EBID's compelling and unique interest cannot be protected simply by allowing EBID to participate as an amicus.

Federal Rules of Civil Procedure (FRCP), and Rule 24(c) of the FRCP provides that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

This Court has held that Rule 17.2 provides only that the FRCP is taken as a "guide" in original actions. *South Carolina*, 558 U.S. at 276 n. 8; *Arizona v. California*, 460 U.S. 605, 614 (1983). Therefore, Rule 17.2 does not require strict compliance with FRCP Rule 24(c), including its requirement that a motion to intervene must include a "pleading."

Section 24(c) itself requires only that the motion to intervene apprise the court and parties of the intervenor's claims, and does not strictly require that a complaint or answer be included as part of the motion to intervene. *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943); *Spring Const. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership v. Nelson*, 708 F.Supp. 1268, 1272 (S.D. Fla. 1989); *United States v. Wagner*, 2011 U.S. Dist. Lexis 63598, at **22-23 (D. Colo. 2011). The Ninth Circuit has stated that the petition to intervene must "fully state[ ] the legal and factual grounds for intervention," and an intervention motion without a pleading is sufficient if "the court [is] otherwise apprised of the grounds for the motion." *Beckman*, 966 F.2d at 474. The Fourth Circuit has stated that in determining whether an intervention motion is invalid under Rule 24(c) if it fails to include a "pleading," "the proper

approach is to disregard non-prejudicial technical effects," and a motion to intervene is valid if it "set[s] forth sufficient facts and allegations" to "apprise" the parties of the intervenor's claims. *Spring Const.*, 614 F.2d at 377, citing 7A Wright & Miller, Federal Practice and Procedure § 1914 (Supp. 1978).

Here, EBID's motion to intervene and supporting brief constitute a "pleading" within the meaning of Rule 24(c), and in any event the motion and brief fully apprised the Court and the parties of EBID's claims and arguments. The parties' briefs opposing EBID's intervention indicate that they fully understand EBID's claims and arguments, and none has indicated any uncertainty concerning EBID's claims and arguments. Thus, none has been prejudiced because EBID did not file a complaint or answer. EBID's motion to intervene thus complies with Rule 24(c), and hence with Supreme Court Rule 17.2.

Even assuming *arguendo* that EBID's motion does not comply with Rule 24(c) and thus with Rule 17.2, the remedy for noncompliance with Rule 24(c) is to require the intervenor to file the necessary pleading and not to deny intervention. *Spring Const.*, 614 F.2d at 377 (holding that failure to file pleading under Rule 24(c) can be "rectified" by later filing of pleading); *WJA Realty*, 708 F.Supp. at 1272 (same). Thus, if the Court decides that EBID's motion to intervene is defective because it did not include a complaint or answer, the Court should require EBID to file a complaint or answer as a condition for its right to

intervene, and EBID will file the appropriate document.

CONCLUSION

For the foregoing reasons, Elephant Butte Irrigation District's motion for leave to intervene should be granted.

Respectfully submitted,

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No. 141 Original

In The
Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,
v.
STATE OF NEW MEXICO
and STATE OF COLORADO,
Defendants.

DECLARATION OF GEHRIG "GARY" LEE ESSLINGER

1. The undersigned, hereby makes the following unsworn declaration, under penalty of perjury, pertinent to the above styled and numbered cause:

2. My family settled in La Mesa, NM in 1912 as members of Elephant Butte Irrigation District (EBID) and has continuously farmed within the district since that time.

3. I have been employed by EBID, the Proposed Intervener, since 1978 in various capacities and currently serve as the General Manager of EBID. I was appointed Treasurer-Manager in 1988 by the EBID Board of Directors.

4. As General Manager, my duties include supervision of the general day to day operation of EBID. I oversee the departments of tax, maintenance, hydrology, operations, engineering, information technology, human resources and ground water resources.

5. With respect to the Rio Grande Project (Project), I am responsible for the interaction with the United States Bureau of Reclamation, the International Boundary and Water Commission and El Paso County Water Improvement District #1 with respect to carrying out EBID's contractual obligations with these parties.

6. I began employment with EBID in November 1978 as an inventory clerk. My main function was to implement the February 15, 1979 Transfer of the Operation and Maintenance of Project Works contract with the United States.

7. The 1979 Contract basically turned operation and maintenance of the entire drainage and distribution system on the Rio Grande Project (Project) located in New Mexico over to EBID. The only other structures remaining in the New Mexico portion of the Project which the United States was still conducting Operation and Maintenance on were the three diversion dams (Percha, Leasburg, and Mesilla) and Elephant Butte and Caballo dams and reservoirs.

8. With the 1979 Contract, United States personnel working on the drainage and distribution system were given notice that their job had been terminated. They were given the option of transferring, taking a job with EBID or retiring. Approximately 80 employees were terminated, reassigned or retired and all of those function formerly performed

by the United States to deliver water were turned over to EBID.

9. As a result of maintenance issues involving the 3 Project diversion dams in New Mexico, the United States and EBID entered into the May 31, 1989 contract where the United States transferred operation and maintenance responsibilities for the 3 diversion dams in the New Mexico portion of the Project to EBID. This included Percha, Leasburg and Mesilla dams. As a result of this contract, EBID now operated diversion dam gates which diverted water from the Rio Grande into the EBID canal system for El Paso County Water Improvement District #1 (Texas District) and Mexico. The United States role was reduced to just monitoring the releases and diversions made by EBID.

10. EBID's role in delivering Texas irrigation district water from the Rio Grande, at Mesilla dam, can be illustrated by example. Water diverted at Mesilla dam bound for the Texas irrigation district, once diverted by EBID at Mesilla dam, travels approximately 22 miles within NM in EBID canals until it reaches the headings of the Texas irrigation district in a part of their district they call the "Upper Valley". Part of that water is also placed into the East Side canal for use in Texas. Historically, part of that water was diverted for use at the Texas Federal Correctional Facility known as "La Tuna". The remainder of the Texas and Mexico order remains in the Rio Grande.

11. Title XXXIII of the Act of October 19, 1996, was historic in that it was the first time Congress had instructed the Secretary to deed back to an irrigation district the drainage and distribution system that it had paid for in its repayment contract. I personally testified in front of congressional committees as part of the process. The final deed conveying the drainage and distribution system to EBID was signed on January 19, 1996. Since that time, other irrigation districts in the West have now followed in EBID's footsteps. The United States still owns and operates Elephant Butte and Caballo dams and reservoirs that store Project water and release it for downstream use under the 2008 Operating Agreement Settlement described below.

12. Also in 1996, EBID begin the installation of monitoring stations in the canals, laterals and drains to provide data to monitor Project surface water that was to be delivered to EBID members, Texas irrigation district members and Mexico.

13. Paragraph 6d of the 1979 Transfer of O&M for Project Contract provided, "A detailed operation plan will be concluded between the United States and the District setting forth procedures for water delivery and accounting. No agreement was concluded until a settlement was reached in litigation with the United States and the Texas irrigation district.

14. On February 14, 2008 the United States and the two irrigation districts signed the Operating Agreement Settlement. The Operating Agreement Settlement is the procedure used by the districts and the United States to divide the Project water supply between the two districts.

15. Under the Operating Agreement Settlement, an Allocation Committee made up of representatives from the two districts and the United States meet and agrees on the allocation, to the two districts. Thereafter, the districts determine the release from Caballo reservoir for the orders from EBID, the Texas District and Mexico and specify the gate opening at Caballo reservoir to achieve the desired flow. EBID is solely responsible for determining the allocation that each of its members will receive.

16. The water, once released, flows downstream until it is diverted by EBID at one of the 3 diversion dams on the Rio Grande. EBID operates and maintains Percha, Leasburg and Mesilla diversion Dams under the 1989 Contract. Project water diverted by EBID at the diversion dams, flows thorough EBID laterals and canals to farmers in New Mexico, where the water is used for irrigation; EBID owns and operates the laterals, canals and drains, and makes all decisions concerning timing and amounts of water diversions and deliveries through the laterals and canals. EBID also makes the diversions at these

dams for delivery of water to the Texas district, Texas district farmers and Mexico.

17. A portion of Project water once used by the farmers within EBID is captured by drainage facilities that are owned and operated by EBID as it delivers to its upstream farmers. These drain return flows are then rediverted into the Rio Grande and become part of Project supply that is used by other farmers within EBID as well as by the Texas irrigation district. This process repeats itself until water is delivered in Texas. In a full allotment year, historically, a release of 790,000 acre feet has yielded a diversion of 960,000 acre feet due to the capture of return flows.

18. All water diverted at Percha and Leasburg dams is for delivery to EBID farmers. Diversions at Mesilla Dam are to make delivery to EBID farmers, direct delivery to Texas farmers that cannot be reached by the Texas district canal system, and delivery to the Texas district for distribution to its farmers and some EBID farmers who cannot be reached by EBID's canal system.

19. On August 9, 1995, EBID and the Texas irrigation district entered into a Joint Powers Agreement which set forth how EBID would deliver water to Texas irrigation district members in Texas. As required by the Joint Powers Agreement Act, the Agreement was also approved by the State of New Mexico on August 18, 1995. This Agreement has been

referred to as the 1995 6A/6B Contract. Under this contract, EBID employees drive across the state line in EBID vehicles and operate turnouts that deliver water to 2400 acres in Unit 6B and 1400 acres in Unit 6C in Texas. EBID also performs maintenance functions on canals, drains, laterals and diversion structures in Texas.

20. A diagram illustrating the release, diversion, delivery and management functions of EBID in the Project in New Mexico and Texas is attached to this Declaration.

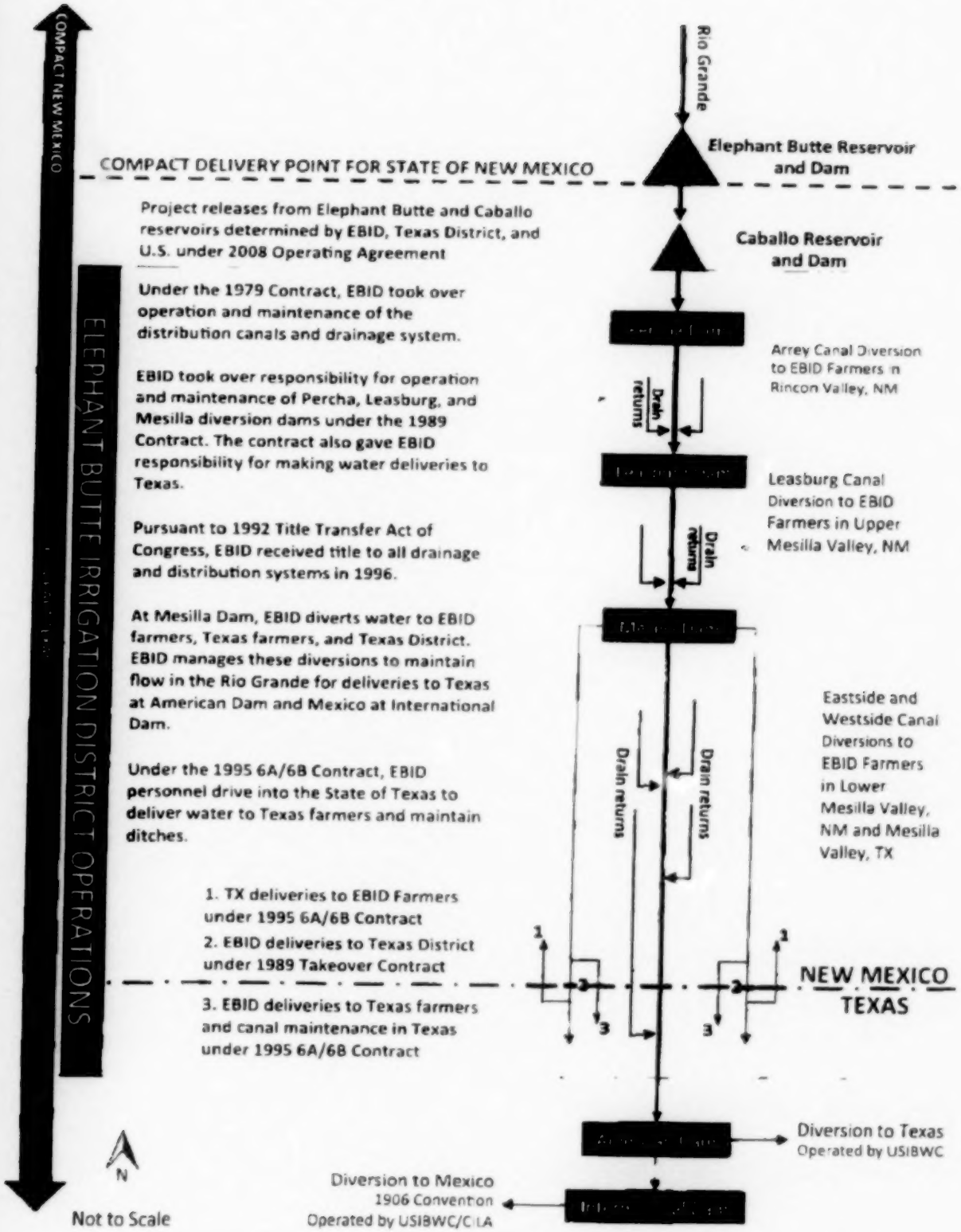
21. An example of how EBID delivers water for use in Texas can be illustrated by an example. If the Texas irrigation district wanted an order of 1,000 cfs for use in Texas, the two districts agree on a setting of the gate height for the opening of the gates at Caballo Reservoir that will meet the orders of EBID, Texas, and Mexico. The United States is given the gate settings which they carry out. Once the release of water is made, EBID has to monitor and divert water though Percha and Leasburg diversion dams as well as account for its own orders, and those of Texas and Mexico. When this 1000 cfs reaches Mesilla dam, based upon the Texas orders and Mexican orders, diversions of 150 cfs is made by EBID into the West Side canal system and 40 cfs into East Side canal system. A total of 190 cfs is in EBID's canal system that will be used in Texas. The remainder of the 1,000 cfs which is 810 cfs continues downstream in the Rio Grande for diversion in

> what the Texas district calls the Lower Valley, along with the water for delivery to Mexico.

I, Gehrig "Gary" Lee Esslinger, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed this 3 day of March 2015.

/s/ Gehrig Lee Esslinger
Gehrig "Gary" Lee Esslinger


COMPACT NEW MEXICO
ELEPHANT BUTTE IRRIGATION DISTRICT OPERATIONS
Rio Grande
Elephant Butte Reservoir and Dam
COMPACT DELIVERY POINT FOR STATE OF NEW MEXICO
Project releases from Elephant Butte and Caballo reservoirs determined by EBID, Texas District, and U.S. under 2008 Operating Agreement
Caballo Reservoir and Dam
Under the 1979 Contract, EBID took over operation and maintenance of the distribution canals and drainage system.
EBID took over responsibility for operation and maintenance of Percha, Leasburg, and Mesilla diversion dams under the 1989 Contract. The contract also gave EBID responsibility for making water deliveries to Texas.
Pursuant to 1992 Title Transfer Act of Congress, EBID received title to all drainage and distribution systems in 1996.
At Mesilla Dam, EBID diverts water to EBID farmers, Texas farmers, and Texas District. EBID manages these diversions to maintain flow in the Rio Grande for deliveries to Texas at American Dam and Mexico at International Dam.
Under the 1995 6A/6B Contract, EBID personnel drive into the State of Texas to deliver water to Texas farmers and maintain ditches.
Drain returns
Arrey Canal Diversion to EBID Farmers in Rincon Valley, NM
Leasburg Canal Diversion to EBID Farmers in Upper Mesilla Valley, NM
Eastside and Westside Canal Diversions to EBID Farmers in Lower Mesilla Valley, NM and Mesilla Valley, TX
1. TX deliveries to EBID Farmers under 1995 6A/6B Contract
2. EBID deliveries to Texas District under 1989 Takeover Contract
3. EBID deliveries to Texas farmers and canal maintenance in Texas under 1995 6A/6B Contract
NEW MEXICO
TEXAS
Diversion to Texas
Operated by USIBWC
Diversion to Mexico
1906 Convention
Operated by USIBWC/CILA
N
Not to Scale

No. 141, Original

Supreme Court, U.S.
FILED
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RECORD AND BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE AS A PLAINTIFF, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

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April 2015

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In The
Supreme Court of the United States

No. 141, Original

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE AS A PLAINTIFF

El Paso County Water Improvement District No. 1 ("EPCWID") moves for leave to intervene as a plaintiff in this original action filed by the State of Texas against the States of New Mexico and Colorado, in which the United States has intervened as a plaintiff. Texas seeks interpretation and enforcement of the terms of the Rio Grande Compact, signed by the states of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress in the Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). The Rio Grande Compact was designed to protect the Rio Grande Reclamation

Project, a federal interstate reclamation project authorized in 1905, Act of Feb. 25, 1905, 33 Stat. 814 ("Rio Grande Project" or "Project"). The Project delivers water obligated to Texas under the Rio Grande Compact as well as to New Mexico irrigators in southern New Mexico. EPCWID supplies water to users in El Paso County, Texas, and is the sole direct Texas beneficiary of the Project; the only other direct beneficiary is Elephant Butte Irrigation District ("EBID"), serving water users in southern New Mexico, and who has moved to intervene in this action as well.

As a beneficiary of the Rio Grande Project, EPCWID has interests in interstate Project water storage and delivery, infrastructure in both New Mexico and Texas, and contracts providing for the allocation of water supply from the Project. EPCWID thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande. No other water user in Texas can claim the kind of direct stake which EPCWID has in the interpretation and enforcement of the Rio Grande Compact. EPCWID's interests, however, are not adequately represented by any of the current parties to this case. Accordingly, EPCWID moves the Court for leave to intervene as a plaintiff to ensure its interests are protected and that the Court has before it all the parties to allow full and effective resolution of this critical dispute. This motion is timely given that no proceedings have occurred to date. EPCWID's intervention as a party

will not prejudice any party or duplicate any of the proceedings. EPCWID's Complaint in Intervention is appended to this motion. The basis for this motion is explained more fully in the memorandum that then follows.

DISCLOSURE STATEMENT

EPCWID is a unit of government, being a political subdivision of the State of Texas created pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, and therefore is not required to file a disclosure statement under Rule 7.1 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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In The
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No. 141, Original

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Plaintiff,

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STATE OF NEW MEXICO
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Defendants.

ON MOTION FOR LEAVE TO INTERVENE

COMPLAINT IN INTERVENTION

1. El Paso County Water Improvement District No. 1 ("EPCWID") adopts and incorporates herein by reference the Complaint in Intervention of the United States (Feb. 27, 2014), subject to the additional allegations and prayer by EPCWID hereinafter set forth. *See* Fed. R. Civ. P. 10(c).

2. EPCWID has sustained damages arising from New Mexico's breaches of the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"), relating to New Mexico's allowing water users within New Mexico to wrongfully divert, and convert to their own uses, Rio Grande Project water that belongs to EPCWID. WHEREFORE, EPCWID prays that the Court:

(a) declare that New Mexico, as a party to the Compact:

(i) may not violate its obligations under the Compact by permitting water users in New Mexico to intercept or interfere with Rio Grande Project water, and

(ii) must affirmatively act to prohibit or prevent such interception and interference;

(b) permanently enjoin and prohibit New Mexico from permitting such interception and interferences;

(c) mandate that New Mexico affirmatively prevent such interception and interference; and,

(d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of EPCWID with respect to the waters of the Rio Grande and the Rio Grande Project.

Respectfully submitted,

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April 2015

In The
Supreme Court of the United States

No. 141, Original

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

MEMORANDUM IN SUPPORT OF MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 TO INTERVENE AS A PLAINTIFF

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In The
Supreme Court of the United States

No. 141, Original

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

MEMORANDUM IN SUPPORT OF MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 TO INTERVENE AS A PLAINTIFF

STATEMENT

I. Factual and Legal Background

El Paso County Water Improvement District No. 1 ("EPCWID") is a political subdivision of the State of Texas, created pursuant to the Texas Constitution, Tex. Const. Art. XVI, § 59, and is a direct beneficiary of the Rio Grande Reclamation Project ("Rio Grande Project" or the "Project"). EPCWID is a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as

counties and other political subdivisions. *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957). Texas Water Code Annotated Section 55.161 sets forth the purposes of a water improvement district as follows:

> (a) A water improvement district may provide for irrigation of the land within its boundaries.
>
> (b) A district operating under Article XVI, Section 59, of the Texas Constitution, may furnish water for domestic, power, and commercial purposes.
>
> (c) A district may be formed to cooperate with the United States under the federal reclamation laws for the purpose of:
>
> > (1) construction of irrigation and drainage facilities necessary to maintain the irrigability of the land;
> >
> > (2) purchase, extension, operation, or maintenance of constructed facilities; or
> >
> > (3) assumption, as principal or guarantor, of indebtedness to the United States on account of district lands.

The Rio Grande Project, authorized by Congress in 1905, is an interstate federal reclamation project which commences with the Elephant Butte Reservoir and Dam in New Mexico, approximately 100 miles north of the Texas state line, and extends south into Texas through El Paso County to Fort Quitman. *See*

Act of February 25, 1905, ch. 798, 33 Stat. 814 (extending the Reclamation Act of 1902, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico) ("Rio Grande Project Act"). Located in a part of the United States with an average annual rainfall of eight inches, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"), and intended for and allocated to EPCWID through the Rio Grande Project for irrigation, crop production, and municipal uses.

From its share of Project water, EPCWID provides water for irrigation of 69,010 acres of Project land within EPCWID's boundaries in El Paso County, Texas, and for miscellaneous purposes pursuant to contracts entered into with the approval of the Secretary of Interior, in accordance with the Miscellaneous Water Supply Act of 1920, 43 U.S.C. § 521 (2011). In addition to the water it supplies for irrigation, EPCWID furnishes a significant portion of the annual water supply of the City of El Paso.

The Rio Grande Project was authorized to supply irrigation water to Elephant Butte Irrigation District ("EBID") in southern New Mexico and EPCWID in western Texas, and pursuant to international treaty, to Mexico. *See* Rio Grande Project Act; Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953

(1906). Pursuant to the Rio Grande Project Act and contracts entered into under federal reclamation law by the United States Department of the Interior Bureau of Reclamation ("Reclamation"), the federal government is obligated to deliver Project water to EPCWID. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1175-76 (10th Cir. 2002); *Bean v. United States*, 163 F. Supp. 838, 841-42 (Ct. Cl. 1958). EPCWID has reimbursed the United States for EPCWID's share of the United States' reimbursable Project construction costs and now holds title to most of the Project works within its boundaries. *See* Act of Oct. 30, 1992, Pub. L. 102-575, § 3301, 106 Stat. 4600, 4705-06.

The Rio Grande Project grew out of years of investigation to develop an irrigation project to serve lands in southern New Mexico and western Texas. The ultimate development of the Project was based on the proceedings of the Twelfth National Irrigation Congress, held in El Paso in 1904. *See generally* Official Proceedings of the Twelfth National Irrigation Congress (Guy E. Mitchell, Ed., 1905) ("1904 Irrigation Congress"). At the 1904 Irrigation Congress, delegates from New Mexico, Texas, and Mexico agreed to the construction of the reservoir to become known as Elephant Butte in New Mexico, and to store and supply irrigation water to what was recognized as irrigable lands of 110,000 acres in New Mexico and 70,000 acres in Texas, above and below El Paso, as well as delivery to Mexico. *Ibid.* at 107-09, 215. Delivery of Project water and other Project operations commenced in late 1916.

Both prior and subsequent to construction of the Project, development of the waters of the Rio Grande continued upstream in Colorado and New Mexico. The upstream development impeded the flows necessary to support irrigation in southern New Mexico, western Texas, and Mexico. As a result, the United States, through the Secretary of the Interior, effectively imposed a moratorium on water development upstream of the development of the planned location of the Rio Grande Project, in both New Mexico and Colorado. *See* Raymond A. Hill, *Development of the Rio Grande Compact*, 14 Nat. Resources J. 163, 165 (1974 No. 2). Consequently, in 1929, Colorado, New Mexico, and Texas entered into a temporary compact to address the interstate allocation of the waters of the Rio Grande. Act of June 17, 1930, ch. 506, 46 Stat. 767 (approving the 1929 compact).

On March 18, 1938, the three states entered into the current Rio Grande Compact, which apportions the waters of the Rio Grande above Fort Quitman, Texas among Colorado, New Mexico, and Texas. The Compact is designed to protect the Project as a means to ensure Compact water delivered into the Project reaches the Project beneficiaries, including reaching the New Mexico-Texas state line for the benefit of EPCWID. The acceptance by Texas of such apportionment was based in part on the existence and efficient functioning of the Project as planned and anticipated to operate in 1938. *See* Hill, *supra*, at 183-84 (stating that "the Rio Grande Compact Commissioners, at the time of executing the Rio Grande

Compact of 1938, anticipated that . . . compliance by New Mexico with the schedules set forth in Article IV would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 acre-feet per year from Project Storage for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico").

On February 16, 1938, just a month prior to the signing of the Compact, EBID and EPCWID, the irrigation districts located within the Project and Project beneficiaries, entered into a contract confirming the acreages in each state which would be irrigated from the Project (based on the ratio of respective acreages) with 67/155th of Rio Grande Project water to be distributed to EPCWID, and 88/155th to EBID ("1938 Contract"). *See* Appendix to Brief of the United States as *Amicus Curiae* (Dec. 10, 2013) (reprinting the 1938 Contract). The 1938 Contract, which was approved by the United States, intended that all "useable water," as defined in the Compact, *see* Compact Art. I(l), would be made available to the lands of EBID and EPCWID in the acreage stated in the 1938 Contract (as well as for delivery to Mexico). Neither the 1938 Contract nor the Compact apportioned a specific amount of water to Project users in New Mexico or Texas. However, it was the intent of the 1938 Contract parties as well as the parties to the Rio Grande Compact that once water was delivered by New Mexico into Elephant Butte Reservoir, such

water was obligated to the Project for the purpose of making Project deliveries to the identified irrigable lands in New Mexico and Texas – thereby ensuring Texas received its share of water apportioned under the Compact.

Subsequent to 1938, however, Rio Grande surface and groundwater uses below Elephant Butte Reservoir in New Mexico proliferated, thereby increasing depletions of useable water. The consequence of this proliferation has been depletions in Project deliveries to EPCWID and a reduction in the efficiency of the Project with respect to delivery of water to Texas. The amount of water captured by increased consumptive use in New Mexico has resulted in less return flow in the Rio Grande, increased seepage, and thus less water available for diversion and use in Texas.

In 2007 EPCWID filed suit against EBID and Reclamation seeking relief to remedy ongoing problems as to how Project water, released from Elephant Butte Dam in New Mexico, should be allocated between EBID and EPCWID, and how those allocations should be delivered, taking into account that some of the Project diversion canals cross the New Mexico-Texas border several times. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., et al.*, No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested the court declare the contractual obligations of the United States and compel Reclamation to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and

the United States. The litigation culminated in a settlement agreement which included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method to allocate and deliver Project water released from Elephant Butte Dam under specified hydrologic conditions. The United States currently delivers Project water to EBID, EPCWID, and Mexico in accordance with the 2008 Operating Agreement. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water below Elephant Butte Reservoir, and interference with the United States' operation of the Project, has, and will continue to have, detrimental effects on EPCWID and the continued viability of the Rio Grande Project.

The Project water rights of EPCWID and the United States have been adjudicated in Texas. In its final decree, the 327th Judicial District Court of El Paso County, Texas, *In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin* (No. 2006-3219, Oct, 30, 2006), adjudicated rights authorizing the United States and EPCWID to impound, divert, and use waters of the Rio Grande Project within Texas based on storage and releases in New Mexico ("Texas decree"). The United States (through Reclamation) is a joint owner with EPCWID of the water rights adjudicated in the Texas decree. The Texas Commission on Environmental Quality, on March 7, 2007, issued a Certificate of Adjudication pursuant to the Texas decree, summarizing the rights

of EPCWID and the United States to store, divert and use Project water ("TCEQ Certificate") (reprinted in the Appendix to this brief). The TCEQ Certificate provides for the right of EPCWID to store and release water from Elephant Butte Reservoir and Dam in New Mexico and to have such water delivered through the Rio Grande Project in New Mexico for diversion and use in Texas. TCEQ Certificate ¶¶ 1(b), 3.

There are two ongoing cases in New Mexico relating to the water supply and operation of the Rio Grande Project, but, although EPCWID is involved in both, neither case can provide the relief requested in this matter by Texas, the United States, or EPCWID. EPCWID is a defendant in the suit brought by New Mexico in the United States District Court in New Mexico seeking to void the 2008 Operating Agreement, *New Mexico v. U.S. Bureau of Reclamation, et al.*, CIV-11-691-JB/ACT (D.N.M., filed Dec. 20, 2011), and is *amicus curiae* in the New Mexico general stream adjudication in New Mexico state court, *New Mexico ex rel. N.M. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M., filed Sept. 24, 1996). In both cases, New Mexico has advanced legal positions that conflict with its obligations under the Compact; and in neither case are the other Compact parties subject to the court's jurisdiction.

II. Procedural Background

The Court granted Texas' Motion for Leave to File Bill of Complaint after receiving briefing on the

Motion from Colorado, New Mexico, and Texas, and *amici curiae* the United States, EPCWID, the City of El Paso, Texas, the City of Las Cruces, New Mexico, and Hudspeth County [Texas] Conservation and Reclamation District No. 1. The United States then moved to intervene as a party and such motion was granted. Pursuant to the Court's order, New Mexico moved to dismiss Texas' Bill of Complaint. The City of Las Cruces, New Mexico, filed a brief *amicus curiae* supporting New Mexico's motion. The United States and Texas, supported by *amici curiae* the City of El Paso, Texas, Hudspeth County Conservation and Reclamation District No. 1, and EPCWID, opposed the motion to dismiss. The motion is pending.

The Court appointed A. Gregory Grimsal, Esquire, as Special Master "with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for." Order (Nov. 3, 2014). After appointment of the Special Master, EBID, in its own right as one of the two direct beneficiaries of the Rio Grande Project, filed with the Court a motion to intervene. New Mexico, Texas, Colorado, and the United States filed responses. EBID's motion to intervene is pending.

While not yet a party to these proceedings, EPCWID has been discussed in the majority of the briefs filed to date. This is appropriate given EPCWID's unique position as a direct beneficiary of

the Rio Grande Project, a party to the 2008 Operating Agreement, by which Reclamation, EBID, and EPCWID allocate and distribute the waters of the Rio Grande Project, the joint holder of rights under the Texas decree relating to a water right in the Rio Grande Project in New Mexico for diversion and use in Texas, and party or *amicus curiae* to proceedings in New Mexico state and federal district court.

ARGUMENT

EPCWID is one of two direct beneficiaries of the interstate Rio Grande Project which both creates New Mexico's delivery obligation under the Rio Grande Compact and establishes Texas' rights to the waters of the Rio Grande. The Project and the contracts relating to delivery of water therefrom, and not the Compact, specifically provide for allocation of water as between the Project beneficiaries in New Mexico and Texas. The Compact, however, was designed to ensure the Project could deliver water as contemplated by the Rio Grande Project Act and the 1938 Contract. As a beneficiary of the Rio Grande Project, EPCWID is a party to contracts with the United States and EBID for delivery of water from the Project, including the 2008 Operating Agreement which allocates water as between Project users in New Mexico and Texas. As a distributor of Project water, EPCWID owns, maintains, and operates irrigation infrastructure which crosses and re-crosses the state line to ensure delivery to both New Mexico and Texas

users. Moreover, as a holder of decreed rights in and to the waters of the Rio Grande Project, EPCWID has rights to water in both Texas and New Mexico: rights of storage and release in New Mexico, and rights of diversion and use in Texas.

These interests are sufficient for EPCWID to satisfy the Court's standard for intervention in original actions:

> "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."

South Carolina v. North Carolina, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)). The unique interests of EPCWID that exist in both Texas and New Mexico are similar to, if not more compelling than, non-state entities the Court has previously allowed to intervene in other cases. EPCWID has a direct stake in the controversy and its participation as a party is necessary in order for the Court to afford full and effective relief in this complex dispute. EPCWID's interests are not adequately represented by Texas or any other party. EPCWID's intervention will not prejudice the parties, but rather will allow full explication of the myriad issues which must be addressed to resolve the matters presented in this unique and complex interstate dispute. EPCWID should be granted leave to intervene.

I. EPCWID's direct stake and interests in the Rio Grande Project are sufficient to satisfy the Court's standard for intervention in this original action.

The Court's standard for intervention by non-state entities in original actions focuses on the particular interests of the putative intervenor in the context of the specific legal and factual circumstances of each case. Under that standard, the Court has considered and allowed intervention by non-state entities where the entity shows a "compelling interest in its own right." *New Jersey v. New York*, 345 U.S. at 373. The Court has allowed intervention when the putative intervenor has demonstrated a significant direct stake in the controversy or interests unique from other water users, particularly where those interests are situate in more than one state. *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256; *Arizona v. California*, 460 U.S. 605 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981). EPCWID has a direct stake in the waters of the Rio Grande in both New Mexico and Texas and a unique and compelling interest in its own right in this interstate compact dispute.

A. EPCWID has a direct stake in this controversy based on its interest in the Rio Grande Project and contracts allocating Project water between New Mexico and Texas.

EPCWID has a compelling interest in the enforcement of the terms of the Rio Grande Compact based on its bi-state interests in the interstate Rio Grande Project and its interest in the contracts which effectuate the delivery of water obligated to Texas under the Compact. Accordingly, intervention is proper because EPCWID has a "direct stake in [the] controversy." *Maryland v. Louisiana*, 451 U.S. at 745 n.21 (permitting intervention of seventeen privately-owned pipeline companies upon whom the tax at issue was imposed because the companies have "a direct stake in this controversy"). If the case at hand will adjudicate rights belonging to the intervenor and have *stare decisis* effect with respect to those interests, intervention is proper. *See Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965). And intervention will be allowed where it is necessary to have non-state entities as parties before the Court to effectuate full and effective relief. *See South Carolina v. North Carolina*, 558 U.S. at 272 (allowing intervention of power company and bi-state water project); *Arizona v. California*, 460 U.S. at 613-15 (allowing intervention of Indian tribes).

The recent case of *South Carolina v. North Carolina* is particularly instructive in demonstrating that EPCWID's direct stake in the Project supports its

intervention. 558 U.S. 256. EPCWID is similarly situated to both entities the Court permitted to intervene in that case, the Catawba River Water Supply Project ("CRWSP") and Duke Energy Carolina, LLC ("Duke"). CRWSP is a bi-state entity that delivers Catawba River water to residents of both states, relying on authority from both states to divert and deliver water. *Ibid.* at 269. It has significant infrastructure investments necessary to comply with its delivery obligations. *Ibid.* Given CRWSP's significant investments and obligations, the Court ruled that it satisfied the standard for non-state intervention because "[a]ny disruption to the CRWSP's operations would increase – not lessen – the difficulty of our task in achieving a 'just and equitable' allocation in this dispute." *Ibid.* at 270. EPCWID's contracts with the United States to receive Project water, and obligations to irrigators and contracts with other users, including the City of El Paso, demonstrate it has a similarly direct stake in this original action as CRWSP in *South Carolina v. North Carolina*. The ability of EPCWID to receive and to distribute water is premised on the effective operation of the Rio Grande Project in both New Mexico and Texas, and pursuant to contracts with the United States and EBID. The effective operation of the Project is dependent on New Mexico's compliance with its Compact obligations to deliver – and not then take back – water to the Project for use by EPCWID as Texas' apportionment of Rio Grande water.

South Carolina v. North Carolina also ruled that Duke, an energy generator and supplier in both states, had a sufficiently unique and compelling interest to support intervention because its interests straddled the two states, and because Duke had significant obligations and contracts with regard to water and power distribution. 558 U.S. at 272-73. As the only signatory to the 2008 Operating Agreement which represents the interests of Rio Grande Project water users in Texas, EPCWID's position is analogous to that of Duke, as "[i]t is likely that any equitable apportionment of the river will need to take into account the amount of water that" EPCWID needs to satisfy its Project related rights and obligations, and therefore EPCWID has "a strong interest in the outcome of this litigation." *Ibid.* at 272. "There is, moreover, no other similarly situated entity on the [Rio Grande in Texas], setting [EPCWID's] interests apart from the class of all other citizens of the States." *Ibid.*

EPCWID's direct interests in the Project, as a party to numerous contracts with EBID, Reclamation, and users to whom EPCWID delivers Project water, means that EPCWID is directly affected by New Mexico's violations of the Rio Grande Compact. This direct effect is analogous to the liability of the pipeline companies in *Maryland v. Louisiana* for the tax in dispute, an interest the Court found sufficiently direct to support intervention. 451 U.S. at 745 n.21. Any interpretation or enforcement of the Compact by this Court will directly impact EPCWID, its

ability to receive water and its obligations for water deliveries. EPCWID should be allowed to intervene to protect its direct stake in the Project and the waters obligated to Texas under the Compact.

B. EPCWID has a unique and compelling interest in its own right to the waters of the Rio Grande in both New Mexico and Texas.

EPCWID's interests, as a beneficiary of the Project which crosses (indeed crisscrosses) state lines, a party to the contracts which provide for bi-state operations and allocations of water, and with water rights in the Rio Grande Project in New Mexico for use in Texas, are sufficiently unique and compelling to support intervention.

In *South Carolina v. North Carolina,* the Court found significant for intervention the fact that both Duke and CRWSP had contractual and other interests in the Catawba River in both South Carolina and North Carolina. 558 U.S. at 270, 273. Those bi-state interests could not neatly be attributed to any one state and the allocation of water from the River as advocated by the respective states would affect the interests of Duke and CRWSP in both states. The Court noted that "neither State has sufficient interest in maintaining that balance to represent the full scope of CRWSP's interests." *Ibid.* at 271. In contrast, the Court denied intervention by the City of Charlotte because the Catawba River was allocated based

on state borders, and Charlotte had no interests that were unique from other North Carolina users. *Ibid.* at 274-75. EPCWID's interests are akin to those of Duke and CRWSP in terms of its bi-state interests premised on the interstate Rio Grande Project. The waters of the Rio Grande are not allocated based on state borders, but on interests in the Project, and the Texas decree adjudicating EPCWID's rights in Project water provides for storage and release in New Mexico for diversion and use in Texas. That decree, and the TCEQ Certificate incorporating and relying thereon, provides for EPCWID to divert and use water in Texas, and specifically recognizes that those rights literally flow from the Rio Grande Project, which stores and releases the water in New Mexico. *See* TCEQ Certificate ¶¶ 1(b), 3. EPCWID's bi-state interests also include the complex system of irrigation infrastructure of the interstate Project. The Project irrigation infrastructure which EPCWID owns, maintains, and operates crisscrosses the state line to provide Project water supply to irrigators in both New Mexico and Texas.

EPCWID's interests in the Rio Grande Project and the waters allocated therefrom are also sufficient to satisfy the compelling interest stated by the Chief Justice in his opinion dissenting from the portion of *South Carolina v. North Carolina*, allowing Duke and CRWSP to intervene. Indeed, the Chief Justice's dissent seemed to presage EPCWID's interests here. In articulating an analysis that intervention in

original actions should be extremely limited, Chief Justice Roberts stated:

> The number of nonsovereigns that the Court should permit to intervene in water disputes is small – indeed, it was zero until today. But that does not mean that a private entity could not satisfy the *New Jersey v. New York* test by, for example, *asserting water-use rights that are not dependent upon the rights of state parties. A private party (or perhaps a Compact Clause entity) with a federal statutory right to a certain quantity of water might have a compelling interest in an equitable apportionment action that is not fairly represented by the States.* The putative intervenors in this case, however, do not hold rights of this sort.

558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment and dissenting in part) (emphasis added). Unlike Duke and CRWSP, whom the Chief Justice thought lacked an interest sufficient to support intervention, EPCWID does in fact have a right to a certain quantity of water pursuant to its interests in the Project, its federal reclamation contracts, and the Texas decree. Accordingly, EPCWID has just the kind of "compelling interest" that must be shown by a non-state entity seeking to intervene in an original action recognized by both the majority and dissent in *South Carolina v. North Carolina.*

The unique circumstances of this case support intervention by EPCWID. Similar to other interstate water compact disputes brought before the Court,

this case is not easily or readily determined by examining the four corners of the Compact. *See, e.g.*, *Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042, 1049-50 (2015) (discussing decision of the special master that increase in groundwater pumping which depleted surface flows violated the Republican River Compact which spoke only to surface water); *Kansas v. Colorado*, 514 U.S. 673, 690-91 (1995) (increase in groundwater pumping which depleted surface flows violated the Arkansas River Compact which on its face related only to surface water). Here, in order to properly interpret and enforce the terms of the Rio Grande Compact, in addition to the Compact itself, the Court must examine and determine the rights and obligations in and to the Rio Grande Project and the contracts relating to the Project. Although Texas is a party to the Compact, the State itself is not a direct beneficiary to the Rio Grande Project, and is not a party to either the 1938 Contract or the 2008 Operating Agreement allocating, as among the two irrigation districts, the available water from the Project. It is those Project contracts that allocate the waters of the Rio Grande below Elephant Butte Dam, not the Rio Grande Compact.[1] Accordingly, for

[1] The essential relevancy of the contracts and the fact that New Mexico's delivery obligation is to the Project at Elephant Butte, rather than at the state line, does not transform this from a dispute regarding the Rio Grande Compact, into, as New Mexico would have it, one of state water law administration within the Project. To the contrary, a principal purpose of the Compact is to protect the Project, including its ability to deliver water to the Texas state line. The delivery to the Project and the

(Continued on following page)

purposes of intervention, it is not relevant that EPCWID is not a party to the Compact. Rather, what is relevant here is the fact that EPCWID is one of the two direct Project beneficiaries who are parties to the contracts which allocate water from the Project, which includes Texas Compact water released from Elephant Butte Dam.

EPCWID's unique interests are akin to those interests found sufficient to support intervention in prior original action cases. In *Arizona v. California*, the Court granted intervention to two Indian tribes as without their presence as parties who claimed a significant interest in the disputed stream system, the case could not be fully or effectively resolved. 460 U.S. at 614-15. Intervention was proper despite the fact that the United States was a party to the case and represented the tribal interests. EPCWID has a direct interest in the water subject to the Rio Grande Compact. As with the tribes in *Arizona v. California*, no full or effective relief may be afforded without EPCWID's intervention.

In *Oklahoma v. Texas*, an action involving a boundary dispute between the states, the Court allowed landowners to intervene where their ownership interests would be potentially affected by the outcome of the boundary dispute. 258 U.S. 574, 581

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continued availability of that water to Project water users in the two states through EBID and EPCWID, is New Mexico's obligation under the Compact. New Mexico is violating this obligation.

(1922). Like the landowners in *Oklahoma v. Texas*, EPCWID has a direct interest in the "property" in dispute in this original action. Texas claims (and EPCWID agrees) that New Mexico is violating its Rio Grande Compact obligations by absconding with Compact water delivered to the Project after it has been released from Elephant Butte Reservoir but before it can reach Texas and not for authorized Project (or Compact) uses. EPCWID has a direct interest in the water Texas and the United States allege New Mexico is allowing to be unlawfully taken from the Project supply.

In *Texas v. Louisiana*, the City of Port Arthur, a political subdivision of the State of Texas, was granted leave to intervene. 416 U.S. 965 (1974). The interests Port Arthur sought to protect were its property interests in islands claimed by the United States. *Texas v. Louisiana*, 426 U.S. 465, 466 (1976). Similarly, here, EPCWID, a political subdivision of Texas, should be granted leave to intervene to protect its rights to waters stored in and delivered by the Project and protected by the Compact.

EPCWID's presence as a party will allow "full exposition of the issues" relating to the Project and the contracts essential to interpret the Rio Grande Compact, a factor the Court has found significant to allowing non-states to intervene in the past. *See Maryland v. Louisiana*, 451 U.S. at 745 n.21 (granting intervention to private pipeline companies because the companies would be liable for paying the disputed tax and their presence was necessary for

"full exposition of the issues"). New Mexico's obligations under the Compact are not a state line delivery, but are to the Project upstream at the Elephant Butte Reservoir in New Mexico. Accordingly, this interstate compact dispute cannot be resolved without understanding and addressing the Project, its operations, and the contracts providing for deliveries from the Project. Under the unique circumstances of this case, in addition to the compacting states, the entities with interests in the Project, the United States, EBID, and EPCWID, all must be parties before the Court to allow full resolution of the Compact dispute which Texas has brought to this Court. The United States has already appropriately been granted intervention based on its asserted interests not in the Compact *per se*, but in the Rio Grande Project. *See* United States Motion to Intervene, at 2; United States Complaint in Intervention, at 5, ¶ (a). EBID has moved to intervene, and EPCWID supports EBID's request for intervention.[2] EPCWID now requests leave to intervene, and EPCWID's motion should be granted.

II. EPCWID is not adequately represented by any party.

EPCWID has presented a sufficiently unique and compelling interest, the corollary of which is that no

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[2] In its reply brief regarding its motion to intervene, EBID appropriately recognizes that EPCWID should be granted leave to intervene. EBID's Reply to Briefs Opposing Motion for Leave to Intervene 30 (March 20, 2015).

other party may completely or adequately represent that interest. While it is true that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens,'" *New Jersey v. New York*, 345 U.S. at 372-73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930)), EPCWID's interests are different from those of the citizens of Texas generally and are not adequately represented by Texas in this case. While sharing interests in ensuring New Mexico complies with its Compact obligations, EPCWID's and Texas' rights and interests are not identical. *See* Texas' Supplemental Brief in Response to New Mexico's Supplemental Brief 5 (Jan. 7, 2014) ("Texas is not a party to EPCWID's 1938 contract with the United States and, more importantly, Texas here seeks relief pursuant to its rights under the Compact and not pursuant to EPCWID's 1938 or any other contract with Reclamation."). Because EPCWID's "water use rights . . . are not dependent upon the rights of state parties" EPCWID has a "compelling interest . . . that is not fairly represented by the States." *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part).[3]

Texas is not a specific beneficiary of the Rio Grande Project or a party to the contracts providing

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[3] Although Texas is not a party to those contracts, as discussed above, those contracts and EPCWID's interests in the Project are essential to interpreting and enforcing the Compact and full resolution of the dispute before the Court.

for the allocation of Project water, and therefore will not be able to fully represent EPCWID's rights to receive its share of Project water supply. Furthermore, Texas has not "expressed an intention to defend [the] terms" of the 2008 Operating Agreement or the 1938 Contract. *Ibid.* at 273 ("Given the importance of Duke Energy's interests and their relevance to our ultimate decision, we believe these interests should be represented by a party in this action, and we find that neither State is situated to do so properly."). Although, the rights of Texas in the Compact are interrelated with the Project, this cannot substitute for EPCWID's direct stake in Project contracts that both pre-and post-date the Compact and which specifically direct how water will be allocated for delivery to EPCWID in Texas. Those interests are sure to be affected by the outcome of this case.

Due to the unique factors present in the Rio Grande Compact, namely that New Mexico's water deliveries for Texas are made into Elephant Butte Reservoir more than 100 miles north of the state line, Texas' interests in the Compact are not truly *parens patriae* with regard to EPCWID. The relationship between Texas and EPCWID is unlike that present in *New Jersey v. New York*, where the Court did not permit Philadelphia to intervene because Pennsylvania, as *parens patriae*, adequately represented the City's interests. *New Jersey v. New York*, 345 U.S. at 373. The Court stated:

> [t]he principle is a necessary recognition of the sovereign dignity, as well as a working

> rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Ibid. Here, however, with the exception of EPCWID no Texas "citizen" is entitled to be a party, as all other Texas citizens lack the bi-state and contractual interests that EPCWID has in the Rio Grande Project, and thus EPCWID is unique in not being represented by Texas as *parens patriae*.

Nor does the United States adequately represent the interests of EPCWID. As is made plain by its memorandum in support of its motion for intervention, the United States has intervened in this action to protect its independent sovereign interests and does not represent nor purport to represent EPCWID. *See* United States' Memorandum in Support of Motion to Intervene as a Plaintiff 4, ¶ 3 (seeking to protect its "distinctively federal interests") (internal quotation marks and citations omitted). Although the United States has an interest in the Rio Grande Project, and is party to contracts providing for the allocation and delivery of Project water to and in Texas, its interests are in the Project as a whole. In contrast, EPCWID has direct interests with respect to ensuring receipt and delivery of Project water ostensibly protected by the Compact. While some of the interests of the United States and EPCWID are aligned, this does not preclude intervention by

EPCWID. *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996-97 (10th Cir. 2009) (United States Forest Service lessee granted leave to intervene because "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public") (internal quotation marks and citations omitted). And where, as here, the interests of the United States relate to the operation of the Project as a whole and not directly to specific allocations of water, intervention is proper. *See S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003) (concluding downstream water users not adequately represented by Army Corps of Engineers, which was "charged with managing the Missouri River system as a whole" and thus "the *parens patriae* presumption . . . does not present an obstacle to intervention").

Moreover, historically, EPCWID and the United States have disagreed over the proper allocation of water from the Project. Those disagreements caused EPCWID to file the 2007 lawsuit against Reclamation for failure to deliver the proper allocation of Project water to Texas. As discussed above, that case was settled by the execution of the 2008 Operating Agreement. While the 2008 Operating Agreement resolved that dispute, EPCWID must independently protect its interests in the water allocated pursuant to that agreement and its broader interests in the Project. The United States does not adequately represent the interests of EPCWID.

III. The participation of EPCWID as a party will aid the Court's decision.

EPCWID is the sole Texas governmental entity that is a party to the 2008 Operating Agreement and a joint holder, with Reclamation, of water rights adjudicated by the Texas decree for the waters obligated to Texas under the Rio Grande Compact, and thus will be directly affected by the Court's interpretation of the rights and obligations of the parties to the Rio Grande Compact. EPCWID is acutely aware of the importance of the issues brought before this Court by Texas and of resolving New Mexico's Compact violations in the only forum that may consider and resolve the full nature of the dispute.

Because of EPCWID's unique bi-state interests as a direct stakeholder in the allocation of Rio Grande Project (and Compact) water, allowing EPCWID to intervene will not open the floodgates to intervention by any other Texas water user. No other water user in Texas can claim the kind of direct and compelling stake which EPCWID has in the interpretation and enforcement of the Rio Grande Compact. There is no risk that intervention by EPCWID will alter the Supreme Court's original jurisdiction "to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. at 373. Other than EBID, there are no other similarly situated entities. *See South Carolina v. North Carolina*, 558 U.S. at 269, 272 (finding the absence of similarly situated entities significant to granting the motions for leave to intervene of Duke and CRWSP).

IV. Granting EPCWID leave to intervene will not prejudice the parties.

EPCWID's intervention will not cause delay or undue prejudice to the existing parties. *See Arizona v. California*, 460 U.S. at 615; *Alabama v. North Carolina*, 560 U.S. 330, 355-56 (2010). EPCWID "do[es] not seek to bring new claims or issues against the states, but only asks leave to participate" based on its vital rights at issue in this case. *Arizona v. California*, 460 U.S. at 614 (concluding intervention by the Tribes did not "enlarge[ ]" the Court's judicial power or compromise the States' Eleventh Amendment immunity). Moreover, New Mexico's Motion to Dismiss and EBID's Motion to Intervene remain pending and no proceedings have occurred.

CONCLUSION

For the reasons stated herein, EPCWID respectfully requests the Court grant it leave to intervene in this original action.

Respectfully submitted,

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April 2015

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

[SEAL]

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION NO. 23-5940

Names of Holders:
United States of America

El Paso County Water Improvement District No. 1

Address:
Bureau of Reclamation
505 Marquette NW, Suite 1313
Albuquerque, NM 87102-2162

294 Candelaria Street
El Paso, TX 79907

Priority Dates:
July 6, 1889 and January 1, 1918

Purpose:
Agricultural, Municipal, Industrial, Mining, and/or Recreational Uses

Counties:
El Paso and Hudspeth

Watercourse:
Rio Grande (above Ft. Quitman, Texas)

Watershed:
Rio Grande Basin

WHEREAS, in 1905, the United States enacted the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat. 814, authorizing the construction of storage facilities on the Rio Grande in the Territory of New Mexico for storage of water of the Rio Grande for irrigation of lands in New Mexico and Texas for the Rio Grande Reclamation Project;

WHEREAS, in 1905, the State of Texas enacted House Bill 588, 29th Legislature, Chapter 101 (as amended, now Section 11.052 of the Texas Water Code), which authorized the Secretary of the Interior to make all necessary examinations and surveys for, and to locate and construct reclamation works for irrigation purposes within the State of Texas, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act of 1902 (38 Stat. 388, now 43 U.S.C. § 371, *et seq.*) as to such lands, subject to all the provisions, limitations, charges, terms and conditions of the said Reclamation Act;

WHEREAS, Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.";

WHEREAS, in 1906, the United States entered into the Convention with Mexico for the Rio Grande providing for the equitable distribution of water of the Rio Grande for irrigation purposes (34 Stat. 2953).

The Convention also provides that the delivery of said amount of water to Mexico shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply furnished from said irrigation system to lands in the United States in the vicinity of El Paso, Texas, and in case of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to Mexico at the Acequia Madre shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States. Under Article IV of such Convention, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the Acequia Madre and Fort Quitman, Texas;

WHEREAS, in 1906 and 1908, pursuant to the Reclamation Act of 1902, the Reclamation Service notified the Territorial Irrigation Engineer for the Territory of New Mexico of reservations by the United States of Rio Grande water for the Rio Grande Reclamation Project in accordance with the laws of the Territory of New Mexico;

WHEREAS, in 1910, Congress approved an Act (36 Stat. 559) which enabled the people of New Mexico to form a constitution and state government and to be admitted to the Union on an equal footing with the original States. Section 2 of such Act provided in part, "that there be and are reserved to the United States, with full acquiescence of the State [New Mexico], all rights and powers for the carrying out of

the provisions by the United States of an Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands' approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto [43 U.S.C. § 371 *et seq.*], as to the same extent as if said State had remained a Territory";

WHEREAS, in 1911, the State of Texas adopted what is now Section 11.005, Texas Water Code, which provides as follows: "This chapter applies to the construction, maintenance, and operation of irrigation works constructed in this state under the federal reclamation act, as amended (43 U.S.C. Sec. 371 et. seq.), to the extent that this chapter is not inconsistent with the federal act or the regulations made under that act by the secretary of the interior.";

WHEREAS, the United States stores water in two reservoirs, Elephant Butte and Caballo, located in New Mexico, for use throughout the Rio Grange [sic] Reclamation Project and for delivery to Mexico. The United States releases water from such storage and supplements such released water with return flow to the Rio Grande and water in the Rio Grande from other sources, and diverts such water at a series of diversion dams on the Rio Grande in New Mexico and Texas;

WHEREAS, the United States purchased lands, canals and water rights in Texas for the construction

of the Rio Grande Reclamation Project, and such purchases included, without limitation, the Franklin Canal and the lands and water rights identified in the Loomis affidavits of 1889, later embodied in Certified Filing No. 123, using Reclamation funds which were subject to reimbursement to the United States by Rio Grande Reclamation Project water users;

WHEREAS, in 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Section 41.009, Texas Water Code), which constitutes statutory law of the United States and the States of Colorado, New Mexico, and Texas and by the terms of the Compact cannot be modified without the approval of all four parties to the Compact;

WHEREAS, the United States releases stored water from Elephant Butte and Caballo Reservoirs to supply water to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to land in New Mexico. A substantial amount of water diverted by these two diversion dams for use in New Mexico is returned to the Rio Grande for use downstream of the dams. The next downstream diversion dam is the Mesilla Diversion Dam, which is located in New Mexico but is used to divert water to both the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1. The

American Diversion Dam is the next diversion dam downstream on the Rio Grande. It is the first diversion dam in Texas, and divides water in the Rio Grande between Mexico and the United States. Water for Mexico is provided by the United States and delivered to Mexico at the International Diversion Dam, in the Rio Grande downstream of the American Diversion Dam. Water for the El Paso County Water Improvement District No. 1 is presently diverted by the United States into the American Canal at the American Diversion Dam, but for many years the United States diverted some of such water at the Riverside Diversion Dam, which is presently not functional but may be rebuilt in the future;

WHEREAS, approximately 2.3 miles downstream from the American Diversion Dam is the International Diversion Dam. The International Diversion Dam is used to provide and deliver 60,000 acre-feet of water per year to Mexico pursuant to the 1906 Convention, and is the only diversion location authorized by the 1906 Convention or any other treaty between the United States and Mexico for diversion of water from the Rio Grande upstream of Fort Quitman, Texas. The Riverside Diversion Dam is the last downstream diversion dam on the Rio Grande below Caballo Dam and upstream of Fort Quitman, Texas. The Riverside Diversion Dam is presently not functional but may be rebuilt in the future;

WHEREAS, the United States entered into a contract dated December 29, 1917, with the El Paso County Water Improvement District No. 1 and the El

Paso Valley Water Users' Association. Thereafter, the El Paso Valley Water Users' Association was dissolved;

WHEREAS, the El Paso County Water Improvement District No. 1 ("District") is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution, and is subject to Chapter 55 of the Texas Water Code and other provisions thereof. The District is authorized by statute to enter into contracts or other obligations with the United States (§ 55.185, Texas Water Code). By statute the District is required to " . . . distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract" (Section 55.364, Texas Water Code). The El Paso County Water Improvement District No. 1 includes 69,010 acres within its boundaries that are classified by the United States and the District as irrigable;

WHEREAS, in 1920, the El Paso County Water Improvement District No. 1 merged with the El Paso County Conservation and Reclamation District No. 2, with the merged districts thereafter known as the El Paso County Water Improvement District No. 1;

WHEREAS, in 1924, the United States entered into a contract (the "Warren Act Contract") with the Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), pursuant to the Warren Act of

1911 (43 U.S.C. §§ 523-525), and the parties amended such contract in 1951. HCCRD holds Texas Permit No. 236 as amended by Permit No. 236A. Such permit authorizes HCCRD to divert water from the Rio Grande at two grade control structures, located at latitude 31.413 degrees north 106.096 degrees west in El Paso County, Texas and at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas;

WHEREAS, in 1996, the United States conveyed to the El Paso County Water Improvement District No. 1 certain facilities and rights-of-way within the District's boundaries but reserved ownership of the American Canal, the American Canal Extension, and the American, International and Riverside Diversion Dams;

WHEREAS, pursuant to 43 U.S.C. § 521, which allows the Secretary of the Interior to authorize conversion of water used in the Rio Grande Reclamation Project from irrigation to other uses, the United States entered into contracts with the El Paso County Water Improvement District No. 1 and the City of El Paso in 1941, 1944, 1949, 1962, 1999, and 2001 for the supply of Rio Grande Reclamation Project irrigation water for municipal and industrial uses by the City. The United States, the El Paso County Water Improvement District No. 1, and the Lower Valley Water District entered into similar contracts in 1988 and 1999 pursuant to 43 U.S.C. § 521 as well;

WHEREAS, in 1991, the District applied for a permit and asserted in its application that without waiving any, and while still preserving all, of its legal and "equitable" rights under federal and state law, (including, without limitation, the Rio Grande Compact; the 1906 Water Convention, May 21, 1906, between the United States and Mexico; contracts between or among the El Paso County Water Improvement District No. 1 and other entities, including the United States and New Mexico or its agencies; the Reclamation Laws of the United States and those acquired in New Mexico by virtue of the reservation of water rights by the United States as provided by notices from the United States to the New Mexico Territorial Engineer in 1906 and 1908). The Texas Natural Resource Conservation Commission (the "Commission") recognized that the El Paso County Water Improvement District No. 1 had those rights to that portion of the facilities and water of the Rio Grande Reclamation Project and the Rio Grande and its tributaries which have been reserved for or appropriated by or for the benefit of the District and its predecessors and beneficial users or which otherwise have been provided to them by law, equity or contract;

WHEREAS, pursuant to such application, the Commission issued to the District Permit No. 5433;

WHEREAS, by final decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3219 [sic], In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort

Quitman, Texas) Segment of the Rio Grande Basin, dated October 30, 2006, rights were recognized authorizing the United States and the El Paso County Water Improvement District No. 1 to impound, divert, and use waters of the State of Texas as set forth below.

NOW, THEREFORE, this certificate to appropriate waters of the State of Texas in the Rio Grande Basin is issued to the United States of America and the El Paso County Water Improvement District No. 1, subject to the following terms and conditions:

1. IMPOUNDMENT AND USE

   a. Certificate Holder United States is authorized to impound 2,638,860 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico

   b. Certificate Holders United States and El Paso County Water Improvement District No. 1 are authorized to divert and Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year from the following sources:

      i. all rights which Certificate Holders acquired or perfected pursuant to Certified Filing No. 123;

      ii. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release

to the Elephant Butte irrigation District and the El Paso County Water Improvement District No. 1, plus any additional share of Project Water obtained by Certificate Holders, or either of them, through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Reclamation Project;

and

iii. any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande.

c. In addition to the water diverted pursuant to paragraph 1.b above, Certificate Holders are authorized to divert from the Rio Grande up to 234,022 acre-feet per year of measurable surface-water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande by the District or any other entity with whom the District has entered into legal contract for such water. "Effluent" as used in this Certificate of Adjudication means any and all water that reaches the bed of the Rio Grande from agricultural drains, sewage treatment plants, or storm water runoff.

d. in addition to the water diverted pursuant to paragraphs 1.b. and 1.c. above, Certificate Holders are authorized to divert from the Rio Grande an average of 1,899 acre-feet of

water per year, when averaged over any five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Diversion Dam.

e. Certificate Holders are authorized to use the bed and banks of the Rio Grande to transport the water which is the subject of this Certificate of Adjudication, and to operate and maintain diversion dams and works.

2. DIVERSION POINTS

a. Certificate Holders are authorized to divert all or any part of the water authorized for diversion in paragraphs 1.b and 1.c above at the following diversion points:

i. Mesilla Diversion Dam located on the Rio Grande in New Mexico;

ii. American Diversion Dam located on the Rio Grande at the point where Texas, Mexico, and New Mexico meet; and

iii. Riverside Diversion Dam located on the Rio Grande approximately 13.5 miles downstream of the American Diversion Dam;

at a combined maximum diversion rate of 1,355 cubic feet per second.

b. Certificate Holders are authorized to divert the water authorized for diversion in paragraph 1.d above, from the American Diversion Dam and the Riverside Diversion Dam at a combined maximum diversion rate of 10 cubic feet per second.

3. PURPOSE AND PLACE OF USE

Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use all of the water authorized herein for agricultural, municipal, industrial, mining, or recreational purposes and/or irrigation of a maximum of 69,010 acres of land within the District's boundaries and/or to sell any of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

4. SPECIAL CONDITIONS

a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.

b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water which the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.

c. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.

5. PRIORITY

a. The time priority for use of the water included in paragraphs 1.b. and 1.c., as referenced above, is July 6, 1889.

b. The time priority for use of the water included in paragraph 1.d., as referenced above, is January 1, 1918.

The locations of pertinent features related to this Certificate of Adjudication are shown on pages 1 through 18 of the Appendix to the Report of the Investigation of Water Rights in the Upper Rio Grande (above Fort Quitman) Segment of the Rio Grande Basin, Texas. Copies of such pages are located in the office of the Texas Commission on Environmental Quality, Austin, Texas.

This Certificate of Adjudication is issued subject to all terms, conditions and provisions in the Final Decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3219 [sic], In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin dated October 30, 2006, and supersedes all rights of Certificates Holders asserted in that cause.

This Certificate of Adjudication is issued subject to senior and superior water rights in the Rio Grande Basin.

This Certificate of Adjudication is issued subject to the rules of the Texas Commission on Environmental Quality and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code, to the extent that such rules and supervision are not inconsistent with the federal Reclamation Act (43 U.S.C. § 371, *et seq.*) or the regulations made under that Act by the Secretary of the Interior as provided in Section 11.005 of the Texas Water Code.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

/s/ Kathleen H. White — 3/7/07

Kathleen Hartnett White, Chairman — Date Issued

ATTEST:

/s/ LaDonna Castanuela

LaDonna Castanuela,
Chief Clerk

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 10 2015
OFFICE OF THE CLERK

No. 22O141, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion to Intervene

TEXAS' BRIEF IN RESPONSE TO EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 MOTION FOR LEAVE TO INTERVENE

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June 2015

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§ 55.351 et seq. 22
§ 55.651 et seq. 22

STATUTES

Act of June 17, 1902, Pub. L. No. 57-161, § 4, 32 Stat. 388 12

Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 1

Act of August 4, 1939, Pub. L. No. 76-260, § 1, 53 Stat. 1187 12

INTRODUCTION

El Paso County Water Improvement District No. 1 (EPCWID) seeks to intervene in this Original Action. The standard for intervention in an Original Action among states is high because it is intended to respect state sovereignty and protect the Supreme Court's limited resources. EPCWID's motion fails to meet this high standard and should be denied.

STATEMENT

The State of Texas was granted leave to file its Complaint against the State of New Mexico in order to obtain a determination and enforcement of its rights to the waters of the Rio Grande pursuant to the Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (hereinafter Rio Grande Compact or Compact). (The Rio Grande Compact is reprinted in the Appendix to the Complaint filed by Texas.) *See* Texas' Brief in Support of Motion for Leave to File Bill of Complaint at 1. The United States was allowed to intervene in this action, as a plaintiff, because of the distinct federal interests involved in this case that are best presented by the United States. *See* Motion of the United States for Leave to Intervene as Plaintiff at 1-2.

New Mexico has moved to dismiss both the Texas and United States complaints. These motions to dismiss have been opposed by both Texas and the United States; they are still pending.

EPCWID is not a party to the Rio Grande Compact. In its Motion for Leave to Intervene (hereinafter EPCWID Motion), EPCWID attempts to justify its intervention based upon the erroneous claim that it "is the sole direct Texas beneficiary of the [Rio Grande] Project" and "thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande." EPCWID Motion at 2.[1] EPCWID also claims "unique bi-state interests" that will aid the Court's decision in this matter. Memorandum In Support of Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene As A Plaintiff (EPCWID Mem.) at 28. These purposes, even if they were true, are not sufficient to meet the high standard for intervention imposed by this Court.

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[1] Contrary to this claim, all those who use water between the Texas state line and Ft. Quitman have an interest in and benefit from Texas' Compact apportionment of Rio Grande water.

ARGUMENT

I. EPCWID'S REQUEST FOR INTERVENTION SHOULD BE DENIED

A. Standard for Intervention

The appropriate standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (*New Jersey*). Under this standard, a non-state entity is only permitted to intervene where: (1) it has "some compelling interest in [its] own right," (2) that interest is different from its "interest in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373; *see also South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (*South Carolina*). The Court has acknowledged that this is a high standard "and appropriately so" as it is intended to respect state sovereignty and protect the Supreme Court's limited resources. *South Carolina*, 558 U.S. at 267.

As the Court explained in *New Jersey*, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens." *New Jersey*, 345 U.S. at 372. The doctrine of *parens patriae* recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* This principle "is a necessary recognition of sovereign dignity, as well as a working rule for good

judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373. Intervention in original actions is therefore only allowed in "compelling" circumstances. *Id.*

The Court has a long history of rejecting attempts by nonsovereign entities to intervene in interstate water disputes. *South Carolina*, 558 U.S. at 281. Until recently, in original actions involving an equitable apportionment, the Supreme Court had only granted intervention to the United States and to Indian tribes. *Id.* at 277, 281-83. As Chief Justice Roberts explained in his dissent in *South Carolina*:

> The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State. And a private entity's interest in its particular share of the State's water once the water is allocated between the States, is an "intramural dispute" to be decided by each State on its own.

Id. at 279 (Roberts, C.J., dissenting in part). This Court's decisions instruct that only the United States, Indian tribes, or other uniquely situated entities, will be allowed to intervene in an original action, such as this one. Because interstate water disputes are cases "between States, each acting as a

quasi-sovereign and representative of the interests and rights of her people," the States are presumed to speak in the best interests of their citizens as a whole, and intervention is not permitted where a entity wholly located and operating within a single state seeks to inject itself into the interstate dispute. *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

B. EPCWID Has Not Met the High Standard for Intervention

1. EPCWID's Interest in the Rio Grande Project Is a Separate and Independent Issue Not Before the Court

EPCWID's argument for intervention is defective because it focuses on various contracts and agreements related to the Rio Grande Project as opposed to the actual Compact claims that Texas and the United States have pled in this original action. EPCWID claims a "direct stake in this controversy based on its interest in the Rio Grande Project and contracts allocating Project water . . . ." EPCWID Mem. at 14. It does not claim, however, a direct stake in the Rio Grande Compact. This original action is a dispute between sovereign states regarding the interpretation of an interstate compact apportioning the waters of the Rio Grande. It is not a dispute over the Rio Grande Project.

This fundamental aspect of the action was articulated when Texas sought leave to file its Complaint in the United States Supreme Court. In

its Reply to New Mexico's Opposition to the Motion for Leave to File the Complaint (Reply), Texas explained that the Rio Grande "Compact cannot be understood without an understanding of the Rio Grande Project." Reply at 4. However, the "interrelationships between the Compact and the Project do not convert Texas' Compact claims into Project claims." *Id.* The United States reiterated this understanding of the dispute when it expressed its view that Texas' motion for leave to file a complaint should be granted. Brief for the United States as Amicus Curiae (Dec. 10, 2013) at 11 (" . . . Texas has adequately pled an injury to its sovereign rights under a reasonable interpretation of the Compact."). The Supreme Court agreed with this characterization of the action when it granted the motion for leave to file the Complaint.

The nature of the dispute has not changed since the Supreme Court granted Texas' motion to file a Complaint against New Mexico. This is an interstate compact case. As such, a potential intervenor must identify a compelling and unique interest under the Rio Grande Compact. Although the history of the Project may be relevant to the interpretation of the Compact, the Court will not be examining or determining the "rights and obligations in and to the Rio Grande Project and the contracts relating to the Project." *See* EPCWID Mem. at 20. To resolve this dispute, the Court will interpret the Compact and declare the rights and obligations of the signatory states thereto.

The interjection by EPCWID of extraneous claims and issues based upon its interest in the operation of the Project, delivery of Project water, and the terms and implementation of the 2008 Operating Agreement are simply not a part of this litigation and detract from the actual focus of the litigation. *See* EPCWID Mem. at 20, 22-23, 25-26. The Court should deny EPCWID's motion to intervene to ensure this original action remains a dispute among sovereign states' regarding their respective interests under an interstate compact.

2. EPCWID Is a "Citizen" of Texas and the Doctrine of *Parens Patriae* Precludes EPCWID's Participation as a Party

a. EPCWID Is a Subdivision of the State of Texas and Derives Its Authority from State Law

As EPCWID acknowledges, EPCWID is a political subdivision of the state of Texas. EPCWID Mem. at 1. Specifically, EPCWID is a district formed under the statutes that the Texas Legislature enacted to fulfill the mandate of the State's Constitution. In 1917, Texas adopted Article XVI, Section 59, of the Texas Constitution, known as the "Conservation Amendment." *Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971). This constitutional provision provides that the "conservation and development of all the natural resources of this State," including "the waters of its

rivers and streams," are "public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." Tex. Const. art. XVI, § 59(a). The amendment authorized the Legislature to create "such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution," and such districts shall have the "authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law." Tex. Const. art. XVI, § 59(b).

Water improvement districts, like EPCWID, are just one category of districts authorized by the Legislature pursuant to this constitutional authority. *See* Tex. Water Code § 55.021 ("A water improvement district may be created in a manner prescribed by this subchapter . . . under and subject to the limitations of . . . Article XVI, Section 59, of the Texas Constitution."); *see also* Tex. Water Code, ch. 54 (creation and governance of municipal utility districts); Tex. Water Code, ch. 58 (creation and governance of irrigation districts). Texas case law has summarized this relationship between the constitutional provision and enabling statutes:

> It is undoubtedly true that the people of Texas through the adoption of Article 16, Section 59, of the Constitution, intended to grant the State broad powers to take steps to conserve our natural resources such as water

> through utilization of such resources. Too, the legislature of Texas, pursuant to the authority there conferred, has passed, ...[various statutes], which authorize the creation of political subdivisions of the State to further the conservation and development of our natural resources. The agencies thus created are political subdivisions of the State . . . However, such agencies have only such powers as are granted by statute . . . .

Harris County Water Control & Improv. Dist. v. Houston, 357 S.W.2d 789, 795 (Tex. Civ. App. 1962) (*Harris County WCID*).

EPCWID is a creature of state statute. The State of Texas authorized its creation, and provides the authority that EPCWID exercises in its jurisdictional boundaries. EPCWID is no different than any other water improvement district, municipal utility district, irrigation district, or any district authorized by the Legislature pursuant to Article XVI, Section 59 of the Texas Constitution. *See Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300 (Tex. Civ. App. 2006) (analyzing the formation of a municipal utility district). "The Texas Legislature has provided for the creation of a number of kinds of conservation and reclamation districts." *Id.* at 308.

The State of Texas also places limits on the authority of EPCWID and other similar districts, and supervises their operations. For example, water improvement districts may only operate and provide irrigation services within their prescribed boundaries. Tex. Water Code § 55.161(a); § 55.163; *see also Harris County WCID*, 357 S.W.2d at 795 (explaining that the statutes "do not authorize the District to roam at large throughout the State and distribute water wherever it wishes without regard to limitations placed on it by statute"). The State maintains this control over districts like EPCWID through a "continuing right of supervision." The Texas Water Code specifically provides that the "power and duties of all districts and authorities created under . . . Article XVI, Section 59 of the Texas Constitution are subject to the continuing right of supervision of the State of Texas . . . ." Tex. Water Code § 12.081(a). This "right of supervision" falls within the jurisdiction of the Texas Commission on Environmental Quality. *See* Tex. Water Code § 5.013(a)(2); 30 Tex. Admin. Code § 293.3.

b. EPCWID Is Like Any Other Water User in Texas

Beyond providing its governmental authority as a political subdivision, the State of Texas also provides EPCWID with the right to use water. EPCWID has no independent right to divert water supplied by the Rio Grande Project apart from its

water right granted under state law.[2] "The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake . . . in the state is the property of the state." Tex. Water Code § 11.021(a). The "right to the use of state water may be acquired by appropriation in the manner and for the purposes provided" in the Water Code. Tex. Water Code § 11.022. The State may also extinguish the right to use its water if the appropriator does not comply with the provisions of the Water Code. Tex. Water Code § 11.030 (forfeiture for non-use); § 11.303 (recordation and filing requirements for certain water right claims); § 11.173 (cancellation of permits for non-use). EPCWID must acquire a water right under state law—like any other water user in the State—by filing a claim and obtaining a permit, certified filing or a certificate of adjudication. *See* Tex. Water Code §§ 11.121, 11.323.

Accordingly, EPCWID's right to divert Rio Grande water derives entirely from Texas state law, not its contract with the United States. Indeed, federal reclamation contracts do not grant a state law "water right" to the contractor. Since the enactment of the Reclamation Act in 1902, the premise of federal reclamation law has been reimbursement: charges levied on irrigated lands are used to repay the costs of constructing project

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[2] EPCWID's statement that its " 'water use rights . . . are not dependent upon the rights of state parties' " is incorrect. *See* EPCWID Mem. at 24.

works incurred by the federal government. *See* Act of June 17, 1902 (1902 Act), Pub. L. No. 57-161, § 4, 32 Stat. 388, 389. The Reclamation Project Act of 1939 formalized a contracting scheme for "the purpose of providing . . . a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payment of construction charges . . . ." Act of August 4, 1939, Pub. L. No. 76-260, § 1, 53 Stat. 1187. Repayment contracts thus were offered to irrigation districts, like EPCWID, and the contracting district would receive project water in exchange for assuming a general repayment obligation for the construction costs of the project. *See Grant County Black Sands Irrigation Dist. v. United States*, 579 F.3d 1345, 1351 (Fed. Cir. 2009) (describing development of contracting authority under reclamation law).[3]

The contracting irrigation district does not obtain a water right recognized under state law by virtue of entering into a federal reclamation contract. *See* 1902 Act, § 8, 32 Stat. 390 (codified at 43 U.S.C. § 383) ("Nothing in this Act shall be construed as affecting . . . or to in any way interfere with the laws of any State or Territory relating to the control,

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[3] Hudspeth County Conservation and Reclamation District No. 1 executed a "Warren Act" contract with the United States. The Warren Act allows the United States to sell surplus water that is "in excess of the requirements of the lands to be irrigated under any project" to non-project landowners. 43 U.S.C. § 523.

appropriation, use, or distribution of water . . ."). Rather, in order to operate federal reclamation projects, the United States must acquire water rights and comply with state law in the "control, appropriation, use, or distribution of water," unless state law is inconsistent with another congressional directive.[4] 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 684-85 (1978). With respect to the operation of the Rio Grande Project in Texas, the United States obtained a water right from the State of Texas to store Rio Grande water, distribute water to Project lands in the State, and divert water to meet treaty obligations to Mexico. *See* Appendix to EPCWID Mem. (reprinting the Texas Commission on Environmental Quality Certificate of Adjudication held by the United States and EPCWID, which authorizes the diversion and impoundment of water at the American Diversion Dam and Riverside Diversion Dam in Texas). EPCWID is no different than any other water user in Texas. It must acquire and then maintain its water right in accordance with Texas state law.

Moreover, even EPCWID's ability to enter into the contracts asserted as the basis for its intervention, is purely based upon a grant of authority from the State of Texas. *See, e.g.*, Tex. Water Code § 55.185 (granting authority to water

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[4] The Compact, of course, is the basis of Texas' sovereign rights to Rio Grande water above Ft. Quitman, which it allocates within Texas pursuant to Texas state law.

improvement districts to contract with the United States to construct, operate and maintain facilities to deliver water and assume debt for district land); § 55.186 (addressing repayment of debt owed by the district under its contract with the United States) § 55.188 (granting authority over property associated with a reclamation project including construction and operation and maintenance). EPCWID could not have acquired a water right absent authority under state law, and it could not have entered into reclamation contracts absent authority under state law. As the sovereign that has both granted and limited EPCWID's powers of government, the State of Texas can and will adequately represent EPCWID's interests in Texas's apportionment of Rio Grande water.

c. EPCWID's Interest Is Not Unique, and Like Other Water Users, Is Dependent Upon Texas' Apportionsment Under the Compact

EPCWID claims that its interest in this dispute is distinct because of its position as a contractor for Rio Grande Project water. This interstate compact dispute, however, does not deal with EPCWID's contract with the United States. This original action centers on the delivery of Texas' apportionment of Rio Grande water pursuant to the Compact. The Compact may use the Project as a method to accomplish delivery of Texas' apportionment, but it is *Texas'* apportionment that is

delivered through the Project and to Texas water users in the State, such as EPCWID.

Moreover, EPCWID's interest in Texas' apportionment of Rio Grande water is not unique. It is an interest shared with all other water users of the State of Texas, and one that the State of Texas seeks to protect in this litigation.[5] In fact, contrary to EPCWID's misleading suggestion, EPDWID is not the only entity within the State of Texas that relies on Rio Grande water or the Rio Grande Project. *See* EPCWID Mem. at 10-11. For example, Hudspeth County Conservation and Reclamation District No. 1 (Hudspeth) also has rights to the Rio Grande via a permit issued by the State of Texas, and has a contractual right to Rio Grande Project water under a Warren Act contract with the United States.[6] EPCWID and Hudspeth have distinct interests, which are adversely affected by actions taken by New Mexico in violation of the Compact, and which require protection by the State of Texas. Both

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[5] To the extent EPCWID seeks any damages by intervention in this litigation, the Supreme Court has never awarded a non-state party money damages in an interstate water compact case.

[6] Hudspeth is authorized to use up to 151,902 acre-feet per year of water from the Rio Grande Project pursuant to a December 1, 1924 Warren Act contract with the United States. In addition, Texas' Upper Rio Grande Adjudication identified the right of Hudspeth to divert up to 27,000 acre-feet from the Rio Grande for irrigation. *See* Brief of Hudspeth County Conservation and Reclamation District No. 1 as Amicus Curiae in Opposition to New Mexico's Motion to Dismiss at 7.

EPCWID and Hudspeth occupy a class of affected Texas users of water and EPCWID's self-declared significance with respect to the use of Texas' allocation of Rio Grande water does not set it apart from Hudspeth or any other user of water in the class.

Additionally, the City of El Paso (City) has interests in the State of Texas' apportionment of Rio Grande water. The City has both a contract for Rio Grande Project water with EPCWID and also maintains wells that may derive, at least in part, water implicated in this litigation.[7] Those interests are derivative of the Compact interests of the State of Texas and, in this context, are no different from the interests that EPCWID here tries to assert are "unique." In this original action, the State of Texas seeks to enforce its rights under the Rio Grande Compact, including the interests of entities such EPCWID, Hudspeth, the City, and all other affected Texas water users. The Court has found such intrastate interests insufficient to justify intervention, and it should do so here.

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[7] The City of El Paso currently has contracts with EPCWID that entitle it to approximately 70,000 acre-feet of water in years when a full allotment of Rio Grande Project water is available. *See* Brief of Amicus Curiae City of El Paso, Texas in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 3. In years with a limited supply of surface water, the City of El Paso pumps up to 80,000 acre-feet of groundwater to meet its demands. *Id.*

d. EPCWID's Interest Is Adequately Represented by Texas

Pursuant to the doctrine of *parens patriae*, states must be deemed to represent their citizens in equitable apportionment actions. The reason for this is clear when one considers that "[t]he interests of a State's citizens in the use of water derive entirely from the State's sovereign interest in the waterway. If the State has no claim to the waters of an interstate river, then its citizens have none either." *South Carolina*, 558 U.S. at 279-80. In *South Carolina*, non-sovereign bi-state entities were permitted to intervene because the Court found that neither state could sufficiently represent these entities' interests. This was based on the fact that the states expressly stated as much. *South Carolina*, 558 U.S. at 270, 273. Here, Texas affirmatively states the opposite. Texas authorizes EPCWID's diversion of water and supervises its functions as a political subdivision and as a water user in the State. Texas, as sovereign, must therefore be deemed to represent the interests of its political subdivision in this litigation.

Although EPCWID claims that its rights and interests "are not identical" to those of Texas and that Texas' interests in the Compact "are not truly *parens patriae*," EPCWID fails to explain how its interest is separate or distinct from Texas' interest in its apportionment under the Compact. ECPWID's interest need not be "identical" to Texas' interest. This is not the standard. In order to be entitled to

intervene, EPCWID needs to demonstrate that Texas will not "adequately represent" ECPWID's interest. EPCWID cannot make this showing. Ultimately, EPCWID's right to water from the Rio Grande Project is derivative and dependent upon Texas' apportionment under the Compact. The entire purpose of Texas' suit against New Mexico is to secure its rights to the water apportioned to it under the Compact.

e. EPCWID's Reclamation Contract Is Not a Basis for Intervention

In *Nebraska v. Wyoming*, 515 U. S. 1 (1995), this Court addressed an issue similar to the circumstances presented here. In that case, Wyoming sought to amend its pleadings to include allegations challenging the United States' management of Reclamation reservoirs on the North Platte River. *Id.* at 15. After noting that these Reclamation reservoirs and the availability of water from them was a predicate to its prior apportionment decree, the Court addressed the United States' concerns that allowing Wyoming's amendment would create the specter of intervention by individuals with storage contracts for water from the Reclamation facilities. *Id.* at 19-22. The Court rejected these concerns noting that in original jurisdiction cases each State must be deemed to represent all of its citizens and is presumed to speak in their citizens' best interests. *Id.* at 21. The Court also reiterated the general rule that water disputes among States may be resolved without the participation of

individual claimants, like those with storage contracts for water from the Reclamation facilities on the North Platte River, who nonetheless would be bound by the result reached through representation by their respective States. *Id.* at 22.

3. EPCWID Has No Direct Bi-State Interests That Justify Its Intervention

a. *South Carolina*

In *South Carolina*, the Supreme Court, for the first time, granted intervention in an interstate water dispute to a non-sovereign entity. Although the Court reaffirmed the rule for intervention enunciated in *New Jersey*, it held that two of the three non-state parties were entitled to intervene under that high standard. *South Carolina*, 558 U.S. at 256. The Court allowed the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke Energy) to intervene, but denied the City of Charlotte's request for intervention.

The Court described CRWSP as "an unusual municipal entity" because it was a joint venture of two counties, one located in North Carolina and one located in South Carolina. *South Carolina*, 558 U.S. at 261, 269. CRWSP was a "bi-state entity" with an advisory board made up of representatives from both counties, obtained its revenue from bi-state sales, and operated infrastructure and assets owned by both counties. *Id.* at 269. Additionally, CRWSP

relied upon authority granted by North and South Carolina to draw water from the Catawba River and its activities depended upon authority conferred by both states. *Id.* As the Court noted, "[i]t is difficult to conceive of a more purely bi-state entity." *Id.* The Court found that CRWSP had a "compelling interest in protecting the viability of its operations, which are premised on a fine balance between the joint venture's two participating counties." *Id.* at 270. This compelling interest distinguished CRWSP "from all other citizens of the party States." *Id.* at 270. Further, the Court was persuaded that neither state could properly represent CRWSP's interests, with North Carolina expressly stating as much. *Id.*

The Court also allowed Duke Energy to intervene. Duke Energy operated eleven dams and reservoirs (six in North Carolina, four in South Carolina, and one on the border between the two states) that controlled the flow of the Catawba River and provided hydroelectric power to the region. *South Carolina*, 558 U.S. at 261. Duke Energy sought leave to intervene based on its interests in the operation of these facilities, as well as its interest in protecting the terms of its existing license governing its power operations (FERC License) and the Comprehensive Relicensing Agreement (CRA), signed by 70 parties in North and South Carolina, which formed the basis of its pending renewal application. *Id.* at 261-62. The Court found that equitable apportionment of the Catawba River would need to take into account Duke Energy's water needs to power the region. *Id.* at 272. Through the

operation of its dams, Duke Energy controlled the flow of the river. As a result, the Court concluded there was "no other similarly situated entity on the Catawba River, setting Duke Energy's interests apart from the class of all other citizens of the States." *Id.* The Court held that these interests should be represented by a party to the action. Furthermore, the Court found that neither state could sufficiently represent these interests, noting that neither state had signed the CRA, and that North Carolina intended to seek its modification. *Id.* at 273.

The Court, however, denied the City of Charlotte's motion to intervene on the grounds that North Carolina, as the sovereign, would adequately protect the City's interests. In reaching this decision the Court noted that (1) Charlotte's transfers of water from the river "constitute part of North Carolina's equitable share," (2) Charlotte occupied "a class of affected North Carolina water users," and (3) Charlotte did not have interests on both sides (i.e., in both states) of the dispute. *South Carolina,* 558 U.S. at 274-75. Charlotte's interest therefore fell "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* at 274. As a result, its request for intervention was denied.

b. EPCWID Is Not a "Bi-State Entity"

Despite its assertions to the contrary, EPCWID is not a bi-state entity like those permitted

to intervene in *South Carolina*. As explained above, EPCWID is a political subdivision of the State of Texas. It derives no power or authority from the State of New Mexico and has no legal presence in New Mexico. Additionally, there are stark differences between EPCWID and CRWSP in *South Carolina*. First, to serve on EPCWID's Board of Directors, one must be a resident of the state of Texas and own land subject to taxation within EPCWID. Tex. Water Code § 55.102. Second, EPCWID obtains its revenue from assessments and taxes imposed on lands within its boundaries. Tex. Water Code § 55.351 et seq.; § 55.651 et seq. Finally, Texas state law alone provides EPCWID with its authority and power, as well as its right to divert and use water in Texas. *See* Appendix to EPCWID Mem. EPCWID is purely an entity of the State of Texas alone.

EPCWID's single-state interests are, in fact, the same as those of the City of Charlotte in *South Carolina*. EPCWID's water constitutes part of Texas' equitable share under the Compact. EPCWID's water users "are dependent on Rio Grande water apportioned to Texas, and allocated to EPCWID through the Rio Grande Project . . . ." *See* Brief of Amicus Curiae El Paso County Water Improvement District No. 1 in Support of State of Texas' Motion for Leave to File Complaint (EPCWID Amicus) at 5. By intervening in this action EPCWID wants to protect its allocation of Rio Grande Project water. However, this is an interest EPCWID shares with all of the other citizens of Texas, including each

of the water users within its boundaries, and one that the state of Texas is presumed to represent as *parens patriae*.

c. EPCWID Does Not Have Interests on Both Sides of the Dispute

EPCWID is also like the City of Charlotte because it does not have interests on both sides of this dispute (i.e., in New Mexico and in Texas). The mere fact that EPCWID is a "beneficiary of a project which crosses (indeed crisscrosses) state lines" is not enough to justify its intervention. Even if EPCWID owns and operates infrastructure in both states, this infrastructure is not at all like the intricate system of dams and reservoirs operated by Duke Energy in *South Carolina*, which effectively controlled the flow of the Catawba River. In contrast to Duke Energy, EPCWID does not own Elephant Butte Dam or Reservoir, nor does it control the releases that are made by the Rio Grande Project. EPCWID's sole purpose in intervening in this action is to protect its allocation of Rio Grande Project water that it provides to water users within its boundaries. EPCWID has an interest on only one side of this dispute and it is an interest shared with many other citizens of the state of Texas. This is insufficient to support EPCWID's request for intervention.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that EPCWID's Motion for Leave to Intervene be denied.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To Intervene

STATE OF COLORADO'S RESPONSE TO EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF

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June 10, 2015

COMES NOW the State of Colorado by and through counsel, in compliance with the date established by the Deputy Clerk of the Court for filing a response, and submits this Response to El Paso County Water Improvement District No. 1's Motion For Leave To Intervene as Plaintiff, submitted in this matter, No. 141, Original.

The State of Colorado must refrain from either supporting or opposing El Paso County Water Improvement District No. 1's motion at this time. Whether it is appropriate for a non-state entity like El Paso County Water Improvement District No. 1 to intervene in this original action will depend in large part on the posture of the case following the Court's decision on New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention. For this reason, Colorado requests the opportunity to reserve its right to file a response to El Paso County Water Improvement District No. 1's motion, to the extent it does not become moot, until

30 days after issuance of an interim report by the Special Master on New Mexico's Motion to Dismiss.

Respectfully submitted by:

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In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S MOTION FOR LEAVE TO INTERVENE

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This action concerns the interpretation of the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Preamble, 53 Stat. 785. On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against the States of New Mexico and Colorado. 134 S. Ct. 1050. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. 134 S. Ct. 1783. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. On November 3, 2014, this Court appointed A. Gregory Grimsal as Special Master, with authority to fix the time and conditions for

the filing of additional pleadings, to direct subsequent proceedings, and to submit reports as he deems appropriate. 135 S. Ct. 474.

Two irrigation districts, one in New Mexico and one in Texas, have moved for leave to intervene. On December 3, 2014, Elephant Butte Irrigation District (EBID), an irrigation district in New Mexico, filed a motion for leave to intervene. New Mexico, Texas, and the United States filed briefs opposing EBID's motion. On April 27, 2015, the Court referred EBID's motion to the Special Master. 135 S. Ct. 1914.

On April 22, 2015, El Paso County Water Improvement District No. 1 (EPCWID), an irrigation district in Texas, filed a motion for leave to intervene as a plaintiff, a complaint in intervention, and a memorandum in support of the motion. EPCWID's motion is the subject of this brief. EPCWID is a political subdivision of the State of Texas. Through a contract with the United States, EPCWID delivers water from the United States Bureau of Reclamation's (Reclamation) Rio Grande Project (the Project) to EPCWID members, who are agricultural water users within its service area. In the view of the United States, EPCWID does not satisfy this Court's standard for intervention by a non-State entity and its motion for leave to intervene should therefore be denied.

STATEMENT

1. The Reclamation Act of 1902 provided authorization and funding for irrigation works in various States, including New Mexico. See Act of June 17, 1902 (1902 Act), ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reser-

voir at Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. Construction of the Project began in 1910. Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73, 83 (Feb. 1938) (*Joint Investigation*). Elephant Butte Reservoir is in New Mexico, approximately 105 miles north of the Texas border.

In 1906, Reclamation entered into contracts with two irrigation districts: the entities now known as EBID in New Mexico, and EPCWID in Texas. Those contracts provide for the irrigation of approximately 155,000 acres of land—67,000 acres in Texas, and 88,000 acres in New Mexico. *Joint Investigation* 73, 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. See U.S. Br. in Opp. to N.M. Mot. to Dismiss App. 1a-4a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico.

The Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. *Id.* arts. I & II, 34 Stat. 2953-2954.

Today, Reclamation continues to calculate diversion allocations under the Project pursuant to the treaty and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agree-

ment entered into by Reclamation, EBID, and EPCWID. See Bureau of Reclamation, U.S. Dep't of the Interior, *Operating Agreement for the Rio Grande Project* (Mar. 10, 2008) (2008 Operating Agreement), http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/OperatingAgreement2008.pdf. Under the 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for "return flows," from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. See Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment: Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 13-14, 18.

On March 18, 1938, the parties signed the Compact, and Congress approved the Compact the following year. 53 Stat. 785. Article IV of the Compact required New Mexico to deliver water at San Marcial, New Mexico—a gauging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission changed the gauge for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. para. 13; N.M. Br. in Opp. 1 n.1. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "[p]roject [s]torage" for purposes of the Compact, Art. I(k), 53 Stat. 786), it becomes "[u]sable [w]ater" under

the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

2. In its complaint, Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Tex. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground," downstream of Elephant Butte Reservoir in New Mexico. *Id.* para. 18.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact: (1) the parties' dispute concerns water released from a federal project for which Reclamation sets the diversion allocations for the irrigation districts downstream of Elephant Butte Reservoir; (2) the United States has an interest in ensuring that New Mexico water users who do not have contracts with the Secretary of the Interior (Secretary) for delivery of Project water, or who use Project water in excess of contractual amounts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries; and (3) the United States has an interest in ensuring that New Mexico water users downstream of

Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See U.S. Mem. in Supp. 5-8.

New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's water rights below Elephant Butte Reservoir are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61).

3. On April 22, 2015, EPCWID filed, in this Court, a motion for leave to intervene as a plaintiff. EPCWID is a political subdivision of the State of Texas. It is a general law water improvement district, created under Texas law, with authority to provide for irrigation of the land within its boundaries and to cooperate with Reclamation for purposes of operating and maintaining federal Reclamation facilities within its boundaries. Tex. Water Code Ann. § 55.161(a) and (c) (West 2002); see Tex. Const. art. XVI, § 59(b).

EPCWID contends (Mem. in Supp. 14-23) that it has a compelling interest in its own right, distinct from its interest in a "class" with other Texas entities, to warrant intervention as an independent party in

this original action. EPCWID maintains that it has a "direct stake" in ensuring that the Compact is enforced because it has a contract with the United States to receive Project water, and it has contractual obligations to deliver water to end users in Texas. *Id.* at 14-17, 19-23. EPCWID contends that its interests are "bi-state" in nature because it has rights to store and release water in New Mexico, and the Project's irrigation infrastructure "crisscrosses" the state line to provide Project water to irrigators in both New Mexico and Texas. *Id.* at 17-18.

EPCWID further contends (Mem. in Supp. 23-27) that its interests are not adequately represented by the existing parties. EPCWID explains that, although it has a shared interest with Texas "in ensuring New Mexico complies with its Compact obligations," the rights and interests of EPCWID and Texas are "not identical." *Id.* at 24. In particular, EPCWID contends that, because Texas is not a "specific beneficiary" of the Project or a party to the 1938 contract dividing the Project's water supply between EPCWID and EBID, and because Texas has not expressed an intention to defend the 1938 contract or the 2008 Operating Agreement, Texas cannot fully represent EPCWID's contractual rights to receive Project water. *Id.* at 24-25.

EPCWID likewise contends (Mem. in Supp. 26-27) that its interests are not adequately represented by the United States. As EPCWID sees it, the United States' interests are "in the Project as a whole," whereas EPCWID "has direct interests with respect to ensuring receipt and delivery of Project water." *Id.* at 26. EPCWID points out that it has disagreed with the United States in the past on the proper allocation

of water from the Project, which prompted its 2007 complaint against Reclamation that resulted in the 2008 Operating Agreement. *Id.* at 27. EPCWID states that it "must independently protect its interests" under that agreement. *Ibid.*

ARGUMENT

This Court has held that "[a]n intervenor whose state is already a party * * * ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The standard for intervention in original cases by non-State entities "is high—and appropriately so," because original actions "tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" and because "respect for sovereign dignity" of the States, which "represent[] the interests of [their] citizens in an original action," "counsels in favor of restraint" in allowing non-State entities to intervene. *South Carolina* v. *North Carolina*, 558 U.S. 256, 267 (2010) (citation omitted). EPCWID has identified no compelling interest to justify its participation as an independent party in this dispute that is not adequately represented by the existing sovereign parties.

1. a. EPCWID contends (Mem. in Supp. 13-17) that it has a "direct stake" in ensuring that the Compact is enforced because it has a contract with the United States to receive Project water, and it has contractual obligations to deliver water to end users in Texas. The Court has previously allowed non-State entities to intervene in original actions based on a

"direct stake" in the outcome of the case. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981) (permitting private corporations to intervene in an original action challenging a State's imposition of a tax); *Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (per curiam) (permitting a municipality to intervene in a sovereign boundary dispute). The Court recently has stated, however, that "a compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions," and the Court reaffirmed in a case involving a dispute over an interstate water resource that the standard set forth in *New Jersey* v. *New York* applies. See *South Carolina* v. *North Carolina*, 558 U.S. at 265. A proposed intervenor whose State is already a party must show a compelling interest, distinct from other "citizens and creatures of" the State, that is not properly represented by the State. *Id.* at 266 (citation omitted); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995); *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 96-97 (1972). Accordingly, EPCWID's "direct stake" in the outcome of this dispute does not, without more, warrant intervention.

b. EPCWID contends (Mem. in Supp. 17-23, 28) that its contracts with the United States to receive Project water and its obligation to deliver Project water to Texas users amount to a unique interest in the case that is distinct from that of other Texas citizens. But EPCWID's contractual rights and obligations are not directly relevant to this dispute over the States' respective rights and obligations under the Compact.

The complaints filed by Texas and the United States seek to establish the sovereign rights among the States, the nature of the apportionment of water agreed to by the States under the Compact, and the rights of the United States on behalf of the Project and under the treaty with Mexico. EPCWID is not a party to the Compact, and it acknowledges (Mem. in Supp. 4, 7-8, 26-27) that the United States operates the Project's dams and reservoirs and determines how much water is allocated to EBID and EPCWID, respectively, pursuant to the 1938 contract and the 2008 Operating Agreement. EPCWID's receipt and delivery of Project water within its service area has no effect on how the water is allocated among the States under the Compact. Those contractual rights and obligations are considered only after the respective rights of the States under the Compact—the subject of this original action—are defined.

2. a. Furthermore, EPCWID is a political subdivision of the State of Texas, created under Texas law, and the area that it serves lies wholly within Texas. Tex. Const. art. XVI, § 59(b); Tex. Water Code Ann. § 55.161 (West 2002). This Court's requirement that an intervenor whose State is already a party must show a compelling interest that "is not properly represented by the state" flows from "the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey* v. *New York*, 345 U.S. at 372-373 (citation and internal quotation marks omitted). Treating a State as the representative of its citizens "is a necessary recognition of sovereign dignity" because it prevents a State from being "judicially impeached on matters of policy by its own subjects." *Id.*

at 373. That concern is directly implicated by EPCWID's motion.

i. EPCWID contends (Mem. in Supp. 23-25) that its interests are not adequately represented by Texas because "EPCWID's and Texas' rights and interests are not identical." Specifically, EPCWID contends that: (1) Texas is not a "specific beneficiary" of the Project or a party to the contracts dividing the Project's water supply between EPCWID and EBID (*id.* at 24-25); and (2) Texas has not expressed an intention to defend the 1938 contract or the 2008 Operating Agreement that govern the division of Project water between EBID and EPCWID (*id.* at 25). Those contentions only serve to highlight that Texas is asserting claims in its sovereign capacity under the Compact, while the interests EPCWID attempts to advance in this original action are more akin to private interests in its contracts with the United States and EBID.

Furthermore, EPCWID's views on the 1938 contract and the 2008 Operating Agreement, to the extent they are different from those of Texas, represent the type of "impeach[ment] * * * by its own subjects" that the Court has concluded is undermining of State sovereignty and inadequate to warrant intervention by a wholly intrastate entity. *New Jersey* v. *New York*, 345 U.S. at 373; see *South Carolina* v. *North Carolina*, 558 U.S. at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court.") (citation and internal quotations marks omitted); cf. *United States* v. *Nevada*, 412 U.S. at 539 (in an equitable apportionment action, a State "has the right, *parens patriae*, to represent all the nonfederal

users in its own State insofar as the share allocated to the other State is concerned").

In *South Carolina* v. *North Carolina*, this Court allowed two non-State entities to intervene in an equitable apportionment action, but each of those entities had unique interstate characteristics that are not present here. The Catawba River Water Supply Project (CRWSP) was "an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States." 558 U.S. at 269. It was a "bistate entity" that was jointly owned and regulated by, and supplied water to, a county in each State, *id.* at 261, and it had "an advisory board consisting of representatives from both counties," "revenue[] from its bistate sales," and "infrastructure and assets that [we]re owned by both counties as tenants-in-common." *Id.* at 269 ("It is difficult to conceive of a more purely bistate entity."). The other entity that was permitted to intervene, Duke Energy, "operate[d] 11 dams and reservoirs in both States that generate[d] electricity for the region and control[led] the flow of the [interstate] river," making it "likely that any equitable apportionment of the river w[ould] need to take into account the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region." *Id.* at 272. Duke Energy also held a license from the Federal Energy Regulatory Commission (FERC) for its hydroelectric facilities, which regulated the flow of the river, and Duke Energy sought to protect a consensus agreement of 70 parties in both States, arrived at in connection with the proposed renewal of Duke Energy's FERC license, regarding appropriate minimum flows. *Id.* at 272-273.

In contrast to the non-State entities that were permitted to intervene in *South Carolina* v. *North Carolina*, EPCWID is an entity that operates only in Texas and manages EPCWID's share of the Project water supply within the State. Tex. Water Code Ann. § 55.161(a) (West 2002) ("A water improvement district may provide for irrigation of the land within its boundaries."). Under Texas law, members of EPCWID's board of directors must be residents of Texas and own land subject to taxation within EPCWID. *Id.* § 55.102. They are elected by voters who hold title to irrigable lands within EPCWID's boundaries. Tex. Spec. Dists. Code Ann. § 9303.051(a)(3) (West 2013). In this respect, EPCWID is analogous to the City of Charlotte, which was denied intervention in *South Carolina* v. *North Carolina* because, unlike CRWSP and Duke Energy, it was a North Carolina entity that fell within the general class of water users in that State, and its interests therefore fell "within the category of interests with respect to which a State must be deemed to represent all of its citizens." 558 U.S. at 274.

EPCWID asserts (Mem. in Supp. 12, 18) that it has bistate interests similar to Duke Energy and CRWSP because it holds decreed rights under Texas law that provide it with "rights of storage and release in New Mexico, and rights of diversion and use in Texas." The certificate of adjudication issued by the Texas Commission on Environmental Quality cited by EPCWID (Mem. in Supp. App. 1-15), however, recognizes that the source of the water that EPCWID is entitled to divert and use in Texas is Project water impounded and released in New Mexico by the United States (not EPCWID). *Id.* at 4-5, 10. And the certifi-

cate does not grant EPCWID any right to store or release Project water in New Mexico. Rather, it gives EPCWID the right to divert and use a portion of the Project water that is stored and released in New Mexico by the United States. *Id.* at 5-6, 10. In any event, a Texas agency could not grant a Texas water improvement district the right to store water in reservoirs located in another State. The authorization to store Project water in reservoirs in New Mexico arises under federal and New Mexico state law pertaining to Reclamation projects.

EPCWID further contends (Mem. in Supp. 18) that its bistate interests include "the complex system of irrigation infrastructure of the interstate Project," owned and operated by EPCWID, which "crisscrosses the state line to provide Project water supply to irrigators in both New Mexico and Texas." The fact that the Project crosses state lines does not amount to a "bistate" interest of EPCWID warranting intervention. Pursuant to a 1980 contract between the United States and EPCWID, the United States agreed to "insure delivery of project water supply allocated to [EPCWID] at [EPCWID] canal headings and other diversion points to be specified by the Contracting Officer, and at State line crossings." App., *infra*, 5a. EPCWID does not receive delivery of Project water in New Mexico. Moreover, in 1996, the United States quitclaimed title to certain Project facilities to EPCWID, but all of those facilities are located in Texas. *Id.* at 9a-35a. Thus, unlike Duke Energy, which operates dams and reservoirs in both South Carolina and North Carolina, EPCWID does not operate any diversion dams in New Mexico. It receives water in Texas after the water flows from New Mexi-

co, and the irrigation district's service area is located entirely within Texas.

ii. To the extent EPCWID contends that it has a unique interest in this case because it is a beneficiary of the Project, see Mem. in Supp. 16, 20-21, 28, the United States has already intervened in this action to protect the Project's water supply from interference by New Mexico. Indeed, EPCWID's complaint, with minor edits to the prayer for relief, simply adopts and incorporates by reference the United States' complaint in intervention. See EPCWID Compl. 1-2. That the United States and EPCWID may have disagreed in the past about how to calculate the 43% to 57% split of Project water between EPCWID and EBID (Mem. in Supp. 27)—a disagreement that gave rise to the 2008 Operating Agreement to which the United States is a signatory—does not mean that the United States cannot adequately represent EPCWID's interest in protecting the Project's overall water supply from interception and interference by New Mexico.

The Court has previously allowed Indian tribes to intervene in an equitable apportionment action, even though the tribes' interests were already protected by the participation of the United States. See *Arizona* v. *California*, 460 U.S. 605, 612-613 (1983). But the Court concluded that the tribes' intervention was warranted because their water rights would be defined by the litigation, and the tribes, as sovereign entities, were entitled to "take their place as independent qualified members of the modern body politic." *Id.* at 614-615 (citation omitted). EPCWID, in contrast, is not a sovereign entity. See *Nebraska* v. *Wyoming*, 515 U.S. at 22 ("[W]ater disputes among

States may be resolved * * * without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States."). Neither of the decisions EPCWID relies upon in support of intervention notwithstanding the presence of the United States as a party, see Mem. in Supp. 27 (citing *WildEarth Guardians* v. *United States Forest Serv.*, 573 F.3d 992, 996-997 (10th Cir. 2009), and *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004)), involved disputes implicating the "respect for sovereign dignity" of the States, which must be deemed to "represent[] the interests of [their] citizens in an original action." *South Carolina* v. *North Carolina*, 558 U.S. at 267.

b. In addition to affording proper respect to the dignity of state sovereignty, treating a State as the representative of its citizens is also a "rule for good judicial administration," because "[o]therwise, * * * there would be no practical limitation on the number of citizens * * * who would be entitled to be made parties." *New Jersey* v. *New York*, 345 U.S. at 373.

Even assuming that Compact enforcement actions such as this could be litigated manageably with an expanded number of parties, the expansion could make it significantly less likely that any of these cases of interstate sovereignty could be resolved through negotiation. This Court has repeatedly stated that the preferred approach for resolving interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power." *Colorado* v. *Kansas*, 320 U.S. 383, 392 & n.4 (1943); see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-106 & n.11 (1938).

The participation of more parties, particularly parties that advance narrower interests that may conflict with the goals of their States, could impede that goal. See *South Carolina* v. *North Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[I]ntervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement between the States, if not the power to block a settlement altogether.").

3. To the extent EPCWID has views on the issues in this original action that are different from those of the parties, it can play an appropriate role in this litigation as an *amicus curiae*. See *Kentucky* v. *Indiana*, 445 U.S. 941 (1980); *United States* v. *California*, 377 U.S. 926 (1964); *New Hampshire* v. *Maine*, 426 U.S. 363, 365 n.2 (1976). EPCWID's views on the relationship between Compact enforcement and Project operations (see Mem. in Supp. 19-23) can be presented to the Special Master and to the Court through the role of an *amicus curiae* without unnecessarily expanding the standard for intervention by non-State entities in original cases to include intrastate actors with no compelling interest that is not already protected by a sovereign party to the dispute.

CONCLUSION

EPCWID's motion for leave to intervene should be denied.

Respectfully submitted.

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JUNE 2015

APPENDIX A

* * * * *

Contract No. 0-07-54-X0904

RIO GRANDE PROJECT
TEXAS—NEW MEXICO

CONTRACT BETWEEN THE

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE
and the
EL PASO COUNTY WATER IMPROVEMENT
DISTRICT NO. 1
for the
Transfer of the Operation and Maintenance of
Project Works

THIS CONTRACT is made this 14th day of March 1980, in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto and particularly the Reclamation Project Act of 1939 and Acts of Congress of June 30, 1948 (62 Stat. 1171, 1179); of May 17, 1950 (64 Stat. 163, 176); of September 21, 1959 (73 Stat. 584); of July 14, 1960 (74 Stat. 480, 492); of March 26, 1964 (78 Stat. 171, 172); and of July 27, 1965 (79 Stat. 285), all herein styled the "Federal Reclamation Law," between the UNITED STATES OF AMERICA, herein styled the "United States," acting for this purpose through the Regional Director, Southwest Region, Water and Pow-

er Resources Service (formerly Bureau of Reclamation), herein referred to as "Contracting Officer," and the EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, herein styled the "District," (a Water Improvement District existing under and by virtue of Article XVI, Section 59, of the Constitution of the State of Texas),

WITNESSETH THAT:

EXPLANATORY RECITALS

WHEREAS, the Rio Grande Project was authorized by Act of Congress in 1905 and subsequent thereto the United States, the District, and the Elephant Butte Irrigation District have entered into a series of contracts relating to the construction, operation and maintenance, and repayment of the costs allocated to the irrigation function of the Rio Grande Project, and

WHEREAS, the series of contracts between the United States and the District includes contracts with the El Paso County Water Improvement District No. 1 dated November 10, 1937, amended October 1, 1939, which contracts cover the care, operation, and maintenance of the project and payment of the adjusted construction obligation allocated to irrigation, and are herein collectively referred to as the "basic repayment contract;" and

WHEREAS, the District has entered into certain contracts for rehabilitation and betterment of the District works, which contracts are dated May 15,

1959; (extended November 16, 1966); and February 12 1971; and

WHEREAS, full repayment to the United States by the District has been made of all construction costs other than those covered by said rehabilitation contracts; and

WHEREAS, the parties desire that the District assume permanent responsibility for operation and maintenance of the District works in the District except certain components thereof as hereinafter more particularly described.

NOW THEREFORE, the parties agree as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed or manifestly incompatible with the intent hereof, the term:

a. "Secretary" or "Contracting Officer" shall mean the Secretary of the Interior of the United States or his duly authorized representative.

b. "District" shall mean the El Paso County Water Improvement District No. 1. In some standard articles, the District is referred to as the "Contractor."

c. "Power and storage reserved works" shall mean the Elephant Butte Dam, Reservoir, and Power System and the Caballo Dam and Reservoir.

d. "Water control and conveyance reserved works" shall mean the Percha, Leasburg, Mesilla, and Riverside Diversion Dams and appurtenances.

e. "Transferred District works" shall mean the remainder of the distribution and drainage system to be turned over to the district for operation and maintenance, more specifically identified on Exhibit "A," attached hereto and by this reference made a part of this contract.

f. "Calendar year" shall mean January 1 through December 31 of each year.

g. "Project Water Supply" shall mean stored water legally available for release in the Elephant Butte and Caballo Reservoirs and including the legally appropriated waters reaching the bed of the Rio Grande River between Caballo Dam and Riverside Diversion Dam.

TRANSFER OF DISTRICT WORKS

2. Effective October 1, 1980, the United States shall transfer to the El Paso County Water Improvement District No. 1 and the District shall assume the operation and maintenance of the transferred District works as identified in paragraph 1.e. above and as shown on Exhibit "A." The United States reserves the right to establish, operate, and maintain hydrological and climatological monitoring devices on or in the transferred District works. Transfer of operation and maintenance of the "transferred District works" to the

District shall be accomplished without expense to the United States. It is understood that the District may contest any expenses incident to such transfer that it feels are inappropriate in nature or amount or inconsistent with the relation of the parties over this agreement or their other existing contracts.

* * * * *

WATER CONTROL

6. a. The United States shall allocate legally available stored project water among Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1, and the Republic of Mexico in accordance with the Rio Grande Project Act of 1905, all applicable Federal Reclamation Laws, the Convention with Mexico For The Upper Rio Grande proclaimed in 1907, all vested rights of the District under all applicable State and Federal law, court decisions, and this contract.

b. The United States will insure delivery of project water supply allocated to the District at District canal headings and other diversion points to be specified by the Contracting Officer, and at State line crossings and will make a prompt accounting of said water deliveries to the District.

c. In interstate canals, laterals, and drains (those physically crossing State lines), the United States reserves the right to direct inter-canal diversions, deliveries, and maintenance of waterways and

structures by the District to assure the delivery of water and protection of lands of the other involved entities outside District boundaries.

d. In case of extraordinary climatic conditions or major accident to the District's distribution facilities, the United States, at its discretion, may adjust spills of allotted water from the District works. The United States will designate respective facilities to be used for spill of such water. A detailed operational plan will be concluded between the United States and the District setting forth procedures for water delivery and accounting.

OPERATION AND MAINTENANCE OF TRANSFERRED WORKS

7. a. The District, without expense to the United States shall care for, operate, and maintain the transferred District works in full compliance with the terms of this contract, and in such manner that said transferred District works will remain in good and efficient condition to perform the carriage, distribution, and drainage of water as well and efficiently as on the date of such transfer to the District.

b. The District shall promptly commence and diligently prosecute any and all repairs to the Federal project works being operated and maintained by the District which are necessary for the proper care, operation, and maintenance in accordance with paragraph a. immediately above. In case of neglect or

failure of the District to commence such repairs within 45 days following written notification and to complete such repairs within a reasonable time, the Contracting Officer may cause the repairs to be made, and the cost thereof shall be paid by the District as prescribed by the Contracting Officer.

c. No substantial change shall be made by the District in any of the major transferred District works without first obtaining written consent of the Contracting Officer. The request for said change shall be made in writing and include a detailed design of the contemplated work. If the Contracting Officer does not reject such change within 60 days, the District may proceed with the work. Substantial change is defined herein as major relocations or major changes in structures and facilities.

d. The District shall hold the United States, its officers, agents, and employees harmless as to any and all damages which may in any manner grow out of the care, operation, and maintenance by the District of any of the project works transferred to the District.

e. If, during the period of any District indebtedness to the United States for construction or rehabilitation of the project or District works, should the District become more than 60 days delinquent in the payment of any amount due on said indebtedness, then at election of the Contracting Officer, the United States may take over from the District the care, operation, and maintenance of such transferred works by

giving written notice to the District of such election any of the effective date thereof and retain the same until such indebtedness is brought current by the District.

* * * * *

IN WITNESS WHEREOF, this contract has been executed as of the day and year first hereinabove written.

THE UNITED STATES OF AMERICA
WATER AND POWER RESOURCES SERVICE

By: /s/ ROBERT H. WEIMER
ROBERT H. WEIMER
Contracting Officer

Attest: EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

_____ By: /s/ JACK H. STALLINGS
JACK H. STALLINGS
President

/s/ JOHNNY STUBBS
JOHNNY STUBBS
Secretary of the El Paso
County Water Improvement
District No. 1

APPENDIX B

Contract No. 6-LM-40-01250

DEED WITHOUT WARRANTY

THE UNITED STATES OF AMERICA ("Grantor"), acting by and through the Bureau of Reclamation, Department of the Interior, pursuant to the provisions of the Act of June 17, 1902 (38 Stat. 388), and acts amendatory thereof or supplementary thereto, particularly Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), hereby grants and conveys, for good and valuable consideration, to EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 ("Grantee"), a political subdivision of the State of Texas existing pursuant to Article XVI, Section 59, of the constitution of the State of Texas whose address is 294 Candelaria, El Paso, Texas 79907, the easements, ditches, laterals, canals, drains, and other rights-of-way listed on Exhibit "A", attached hereto and made a part hereof, together with the improvements and appurtenances, if any, used or constructed by Grantor, known as the irrigation facilities of the Rio Grande Project, located in El Paso County, Texas, as shown and described on the maps and plats of Grantor which are now located in Grantor's office in El Paso, El Paso County, Texas, possession of which maps and plats is being delivered to Grantee simultaneously with the execution and delivery by Grantor of this Deed Without Warranty, reference to such maps and plats being

here made for a complete description and for all purposes and copies of some of Grantor's maps, called Irrigable Land Area Maps, being attached hereto to further assist in the identifications of the Property conveyed hereby.

TOGETHER WITH a perpetual easement in the land presently utilized for the Franklin Canal from the settling basin adjacent to the International Dam to the beginning of the Chamizal project identified by point A adjacent to the Leon Street wasteway for a canal subject to the Grantor's superior right to place the Rio Grande American Canal Extension in that location in accordance with the terms of Public Law No. 101-438 and the Agreements between the United States Section, International Boundary and Water Commission, United States and Mexico (USIBWC) and the El Paso County Water Improvement District No. 1 (EPCWID#1), USIBWC Nos. IBM-93-10 and IBM-93-20 both dated March 23, 1994.

TOGETHER WITH lands and facilities of the Rio Grande Project which are commonly referred to as the Ysleta Yard, including all improvements located thereon or used in connection therewith and described more specifically and identified on Exhibit "B" attached hereto and made a part hereof.

TOGETHER WITH the property more specifically described on Exhibit "C" attached hereto and made a part hereof.

TOGETHER WITH A perpetual easement to utilize that portion of the Riverside Diversion Dam located in the United States for the purpose of diverting and transporting irrigation water.

TOGETHER WITH the perpetual easement reserved to Grantor for the benefit of Grantee in that certain Quitclaim Deed, Contract No. 6-LM-40-01260, dated January 19, 1996, between the United States of America as Grantor and the Elephant Butte Irrigation District as Grantee.

TOGETHER WITH all right, title, and interest of Grantor, not expressly reserved herein, in any and all easements, ditches, laterals, canals, drains, and other rights-of-way which the United States has acquired in El Paso County, Texas, on behalf of the Rio Grande Project, that are used solely for the purpose of serving the Grantee's lands (those irrigable lands located within the boundaries of Grantee's District) and which the Secretary determines are necessary to enable the Grantee to carry out operation and maintenance with respect to that portion of the Rio Grande Project located in El Paso County, Texas, whether obtained or claimed by Grantor by express grant, adverse possession, court judgment, or otherwise.

All of the above is hereinafter collectively referred to as the "Property".

BUT EXCEPTING AND RESERVING FROM THIS CONVEYANCE, unto Grantor, its heirs and assigns forever:

1) A perpetual easement to Grantor in and to the ditches, laterals, canals, sublaterals, drains, spillways, and right-of-ways or any other facilities in the State of Texas which are presently in use, directly or indirectly, or of any other facility which may be necessary for transportation of any Rio Grande Project water released from Elephant Butte Dam or Caballo Dam for use by Elephant Butte Irrigation District for storage or delivery in or through any such facility, this easement to be exercised in accordance with that certain Agreement made and entered into the 9th day of August, 1995, pursuant to the Joint Powers Agreement Act of New Mexico and the Texas Interlocal Cooperation Act by and between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1;

2) A temporary easement, to Grantor, not to extend beyond three (3) years from the date of execution of this deed on, over or across all drains outside the City Limits of the City of El Paso, Texas, in El Paso's Lower Valley, for the purpose of performing such construction, reconstruction, or rehabilitation work of the irrigation system as, Grantor, in its sole discretion, may deem necessary;

3) Any water or water rights of Grantor whatsoever; and

4) A perpetual easement to the Grantor to come upon the property, after reasonable notice to the Grantee, to obtain water samples and perform such other minor testing as may be required for the administration and operation of the Rio Grande Project.

THIS CONVEYANCE IS SUBJECT TO oil, gas, and other mineral rights heretofore reserved of record by or in favor of third parties; ALSO SUBJECT TO permits, licenses, leases, rights-of-use, or rights-of-way of record outstanding in third parties on, over, or across said lands or facilities, save and except any permit, license, or other rights, if any, granted in, over, or in connection with Ascarate Wasteway to Chevron U.S.A., Chevron Pipe Line Company, or their assigns, unless and until such permit, license, or other right shall have been finally upheld through the appeals process, Grantee reserving the right to contest, appeal or otherwise legally challenge the validity of any such permit, license, or other right. Benefits, payments, and responsibilities of Grantor arising after the date of this deed under such existing rights-of-use, and defined in 43 CFR 429, shall inure to benefit of and be binding upon Grantee.

TO HAVE AND TO HOLD unto Grantee, and Grantee's successors and assigns, the Property, together with all and singular the rights and appurtenances thereto in any wise belonging, forever. This

Deed Without Warranty is given and accepted without any warranty of title.

NOTICE IS HEREBY GIVEN that:

1) Acting pursuant to the requirements of 40 CFR 373, on July 23, 1993, Grantor performed a hazardous waste survey of the lands and facilities herein conveyed, and a copy of said survey was delivered to Grantee in a letter dated July 7, 1995. The lands and facilities conveyed herein to Grantee are being conveyed in the same condition as existed on the date of said survey and which condition is more particularly described in that survey. No remediation by Grantor on behalf of Grantee has been or will be made.

2) Grantee has used these facilities for decades and has had operation and maintenance responsibility for nearly twenty years and accepts these facilities "as is" and also accepts any liability accruing hereafter as a result of the ownership, operation or maintenance of the property and subject to applicable state and Federal law.

No perpetual easement granted herein creates any obligation on the part of the Grantee to operate or maintain any bridges or other structures owned by the United States, and the Grantee acknowledges that this perpetual easement shall not be exercised in such a manner as to unreasonably interfere with the operations of the United States or its agencies.

Notwithstanding anything to the contrary, nothing in this deed shall be construed to affect in any fashion the claims of the parties including those claims asserted in that action styled ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 OF TEXAS v. UNITED STATES DEPARTMENT OF INTERIOR, et al., Civil No. CIV-90-95 HB/WWD.

Notwithstanding the foregoing, no breach of any condition or agreement herein shall be deemed to be a failure of consideration or entitle Grantor to rescind this Deed Without Warranty.

If any further specific conveyances should be necessary hereafter, because of the discovery of additional Property of the Rio Grande Project in El Paso County, Texas, not listed on the Exhibits or to more specifically and legally describe the Property, then Grantor shall make reasonable efforts to provide such conveyances, on the same terms and conditions set forth hereinabove.

WITNESS the hand of said Grantor this 19th day of January, 1996.

UNITED STATES OF AMERICA

/s/ CHARLES A. CALHOUN
CHARLES A. CALHOUN
Regional Director
Department of Interior

Bureau of Reclamation
Upper Colorado Region
Salt Lake City, Utah,
acting for the Secretary
of Interior of the United States

RSO APPROVED

/s/ CHRISTOPHER B. RICH
CHRISTOPHER B. RICH

ACKNOWLEDGMENT

State of Utah)
County Salt Lake) ss.
)

On the 19th day of January, 1996, personally appeared before me Charles A. Calhoun, known to me to be the Regional Director of the Bureau of Reclamation, Upper Colorado Region, United States Department of the Interior, the signer of the above instrument, who duly acknowledged to me that he executed the same on behalf of THE UNITED STATES OF AMERICA pursuant to authority delegated to him from the Secretary of the Interior.

/s/ DEBORAH L. LAWLER
DEBORAH L. LAWLER
Notary Public in and for
the State of Utah

(NOTARY SEAL)

[SEAL OMITTED]

ACCEPTANCE

The parties intend for the above Deed Without Warranty to satisfy the terms of Title XXXIII of Public Law 102-575. Grantee accepts this Deed Without Warranty on the terms and conditions stated therein.

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT NO. 1

By: /s/ JOHNNY STUBBS
JOHNNY STUBBS

Title: president

ATTEST:

By: /s/ INDAR SINGH
INDAR SINGH

Title: Secretary

(DISTRICT SEAL)

ACKNOWLEDGEMENT

State of)

County of)

)

On this 22nd day of January, 1996, before me, the undersigned officer, personally appeared Johnny Stubbs RW, to me known and known to me to be the same person whose name is subscribed to the foregoing acceptance, who being by me duly sworn did depose and say that he is the President of the EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, that he is duly designated, empowered, and authorized by a resolution adopted by the Board of Directors of the EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, on January 22, 1996, to execute the foregoing acceptance and sign his name thereto, and that he signed his name thereto and acknowledges that he executed the foregoing instrument for and on behalf of the EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 for the purposes and uses therein described.

/s/ ROSALINDA WATERS
ROSALINDA WATERS
Notary Public in and for
the State of

(NOTARY SEAL)

[SEAL OMITTED]

EXHIBIT "A" TO DEED WITHOUT WARRANTY FOR EPCWID#1

CANALS	LATERALS	DRAINS	WASTEWAYS
	ALFALFA	ANTHONY ANTHONY SPUR ALAMO ALTO	ASCARATE
	BAKER BARRIAL BERNAL BOYER BOWMAN	BORDER BORDER INTERCEPTING BORDER SPUR 1&2 BORDERLAND SPUR	BERNAL LATERAL WW BORDERLAND SPUR DRAIN WW
CANUTILLO	CANAS ARRIAS CANUTILLO CINECUE CLINT EXTENSION CLINT COFFIN COOK-SCHULTZ CRISMORE (AKA S-379) CUADRILLA C-1 (AKA COLER)	CENTRAL CENTRAL SPUR CLINT SPUR COOK INTERCEPTING CRAWFORD SPUR CUADRILLA INTERCEPTING	CRISMORE LATERAL WW CLINT LATERAL WW #1,2
	DAUGHERTY DEL MONTE DE GROFF (AKA YSLA-147)	DOLAN DOLAN SPUR DORROUGH SPUR DORROUGH DUCKETT INTERCEPTING DUCKETT SPUR	
	ELLIS ESCAVEDA	EAST	
FRANKLIN; ONLY THAT PORTION RUNNING EASTERLY FROM THE CENTERLINE OF 2nd STREET TO THE END FRANKLIN FEEDER	FARM DETENTION FARM SPILLWAY	FABENS FABENS INTERCEPTING FRANKLIN FRANKLIN INTERCEPTING FRANKLIN SPUR FABENS WASTE CHANNEL	FRANKLIN CANAL
	GLARDON GRANDVIEW GREEN GUADALUPE LAT. & LAT. EXTENSION GUADALUPE INTERCEPTING		GREEN LATERAL WW GRANDVIEW LAT. WW GUADALUPE EXT. LAT. WW GUADALUPE INT. LAT. WW

EXHIBIT "A" TO DEED WITHOUT WARRANTY FOR EPCWID#1

CANALS	LATERALS	DRAINS	WASTEWAYS
HUSPETH FEEDER #1 HUSPETH	HALL HANSEN HIGHBANK HANSEN FEEDER	HANSEN INTERCEPTING HANSEN FEEDER INTERCEPTING	
ISLAND MAIN ISLAND FEEDER	I-72 (AKA ISLAND) I-136 " " I-154 " " I-206 " " I-207 " " I-243 " " I-270 " " I-341 " " IF-57 (AKA ISLAND FEEDER) IRWIN ISLAND MAIN I-O (AKA ISLAND)	ISLAND ISLAND SPUR ISLAND FARMERS I-T SYPHON (AKA ISLAND TORNILLO) I-F ISLAND FEEDER INTERCEPTING ISLAND CONNECTION ISLAND DRAIN SYPHON	I-206 ISLAND LAT. WW I-243 ISLAND LAT. WW ISLAND FEEDER WW
	JORNADO JUAN DE HERRERA "A" JUAN DE HERRERA "B" JUAN DE HERRERA "C" JUAN DE HERRERA MAIN	KELLY INTERCEPTING	
LA UNION EAST	LA UNION EAST LA UNION WEST LA UNION COMBINED LEE LOWENSTEIN	LAKE SPUR LEE MOOR INTERCEPTING	LEON STREET WW
	MONTOYA MAIN MONTOYA "A" MONTOYA "B" MONTOYA "C" MONTOYA "D" MALONE MADRE	MONTOYA MESA MESA SPUR 1&2 MIDDLE MESA OUTLET	
	NEWMAN NORTHSIDE	NEMEXAS	
	ORR	ORR'S SPUR (AKA ORR'S)	
	PENCE PLAYA	PEREZ SPUR PLAYA PLAYA INTERCEPTING PLAYA INTERCEPTING "A"	

EXHIBIT "A" TO DEED WITHOUT WARRANTY FOR EPCWID#1

CANALS	LATERALS	DRAINS	WASTEWAYS
	QUEMADA		
RIVERSIDE RIVERSIDE EXTENSION	RIVER RIVERSIDE RODRIGUENA ROWLEY RIO	RIVER RIVER OUTLET RIVER SPUR RIVERSIDE INTERCEPTING & EXTENSION RIO INTERCEPTING RIVER SPUR #1	RODRIGUENA LATERAL WW RIVERSIDE CANAL WW RIVERSIDE CANAL INTAKE STRUCTURE
SOUTHSIDE FEEDER	SOUTHSIDE FEEDER SOUTHSIDE SOCORRO STEVENS SCHUTZ SAN ELIZARIO SALITRAL S-379 (AKA CRISMORE) S- IS NOT SALITRAL	SAN FELIPE ARROYO SOCORRO INTERCEPTING SEGUILA INTERCEPTING	SAN ELIZARIO WW # 1 SOCORRO LATERAL WW SALITRAL LATERAL WW
TORNILLO	TEXAS T-216 (AKA TORNILLO) T-520 " " THREE SAINTS EAST THREE SAINTS T-131 (AKA TORNILLO) T-462 " " T-217 " "	TORNILLO TORNILLO SPUR THOMPSON SPUR TORNILLO OUTLET TORNILLO INTERCEPTING #1,2,3	T-131 (AKA TORNILLO) LATERAL WW TORNILLO CANAL WW T-520 LATERAL WW
	UPPER CLINT	UPPER TORNILLO	UPPER CLINT LATERAL WW
	VALLEY GATE VINTON VINTON RIVER VINTON CUTOFF	VINTON VINTON RIVER VALLEY GATE INTERCEPTING VALLEY GATE SPUR	
	WADLINGTON WEBB	WARNOCK SPUR WEST	WASTEWAY #35C,#35,33B,35A,34 37,32A,29,23A, 1&2
	Y-65 (AKA YSLA) Y-147 (AKA YSLA), (AKA DE GROFF) Y-197 (AKA YSLA) Y-303 " " YSLA YSLA EXTENSION Y-251 (AKA YSLA)		YSLA LATERAL WW Y-303 (AKA YSLA) LATERAL WW Y-147 (AKA YSLA) LATERAL WW YSLA EXTENSION LATERAL WW
	ZACK		

82989

BOOK 596 PAGE 379

WARRANTY DEED.

EXHIBIT B

THE STATE OF TEXAS |
COUNTY OF EL PASO |

KNOW ALL MEN BY THESE PRESENTS: Charles B. Caal and George W. Caal, individually and as Independent Executors of the Estate of I. G. Caal, deceased, Frank Felix Caal and Lillian M. Eden, a single woman, of the County of El Paso, State of Texas, in consideration of the sum of Three Hundred Fifty Dollars ($350.00) Dollars, to us in hand paid by The United States of America, pursuant to the Act of June17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, the receipt of which is hereby acknowledged, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said The United States of America, all that certain tract or parcel of land, lying in the County of El Paso and State of Texas, and more particularly described as follows, to wit:

A tract of land included in a tract of land lying and situate in the Ysleta Grant, El Paso County, Texas, in the North half Northeast quarter (N½NE¼) Section Thirty five (35) Township Thirty one (31) South, Range six (6) East, Bureau of Reclamation Survey, being also within Tract ten (10) Block forty six (46) as shown on plat of official resurvey of the Ysleta Grant as accepted by the Commissioner's Court of El Paso County, Texas the 8th day of February, 1932, and of record in the office of the County Clerk of said County and State, being more particularly described as follows:

Beginning at the point of intersection of the Easterly right of way line of Sacramento Street and the Southeasterly right of way line of a road parallel and adjacent to the G.H. & S.A. R.R. Depot Grounds, said point of beginning being the North corner of a tract of land heretofore conveyed to the United States of America by I. G. Caal et al; thence South forty five degrees (45°) nine minutes (09') East along the Southeasterly right of way line of road adjacent to the G.H. & S.A. R.R. Depot Grounds six hundred thirty eight and eight tenths (638.8) feet to a point from which the East corner tract ten (10) block forty six (46) of the resurvey of the Ysleta Grant bears South forty five degrees (45°) nine minutes (09') East twenty one and eight tenths (21.8) feet; thence South twenty one degrees (21°) thirty one minutes (31') West one hundred eighty four and fifteen hundredths (184.15) feet; thence North forty five degrees (45°) nine minutes (9') West six hundred forty three and eighty eight hundredths (643.88) feet to a point on the Easterly right of way line of Sacramento Street; thence North twenty two degrees (22°) fifty nine minutes (59') East along said street line one hundred eighty two and two tenths (182.2) feet to the point of beginning, said tract of land containing two and five tenths (2.5) acres more or less, of which one and five tenths (1.5) acres is the property of the United States of America and the remainder or one (1) acre is the part herein intended to be conveyed, all as shown on plat attached to contract dated January 21st, 1938, between ourselves as vendors and the United States of America as vendee, of record in the Deed Records of El Paso County, in Volume 598, page 136.

TO HAVE AND TO HOLD the above described premises, together with all and singular, the rights and appurtenances thereto in any wise belonging, unto the said The United States of America, its successors and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators and successors, to warrant and forever defend all and singular, the said premises unto the said The United States of America, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or

Correct as to Mgr. Data:

TRUE AND CORRECT COPY OF THE ORIGINAL RECORD FILED IN EL PASO COUNTY, TEXAS
HECTOR ENRIQUEZ JR., COUNTY CLERK

EXHIBIT B

any part thereof.

WITNESS our hands at El Paso, Texas, this 8th day of April, A. D., 1935.

One 50¢ Doc. Rev. Stamp,
Cancelled: C.B.G. G.W.G. L.M.G. F.F.G.
4/8/35.

Charles B. Gaal,

George W. Gaal,
Individually and as Independent
Executors of the Estate of
I. G. Gaal, Deceased.

Lillian M. Eden.

Frank Felix Gaal.

THE STATE OF TEXAS |
COUNTY OF EL PASO |

BEFORE ME, Geo. W. Hoadley, a Notary Public, in and for El Paso County, Texas, on this day personally appeared Charles B. Gaal and George W. Gaal, individually and as Independent Executors of the Estate of I. G. Gaal, Deceased, Frank Felix Gaal and Lillian M. Eden, a single woman, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated.

GIVEN under my hand and seal of office, this 9th day of April, A. D., 1935.

(Notarial Seal: County of El Paso, Texas.)

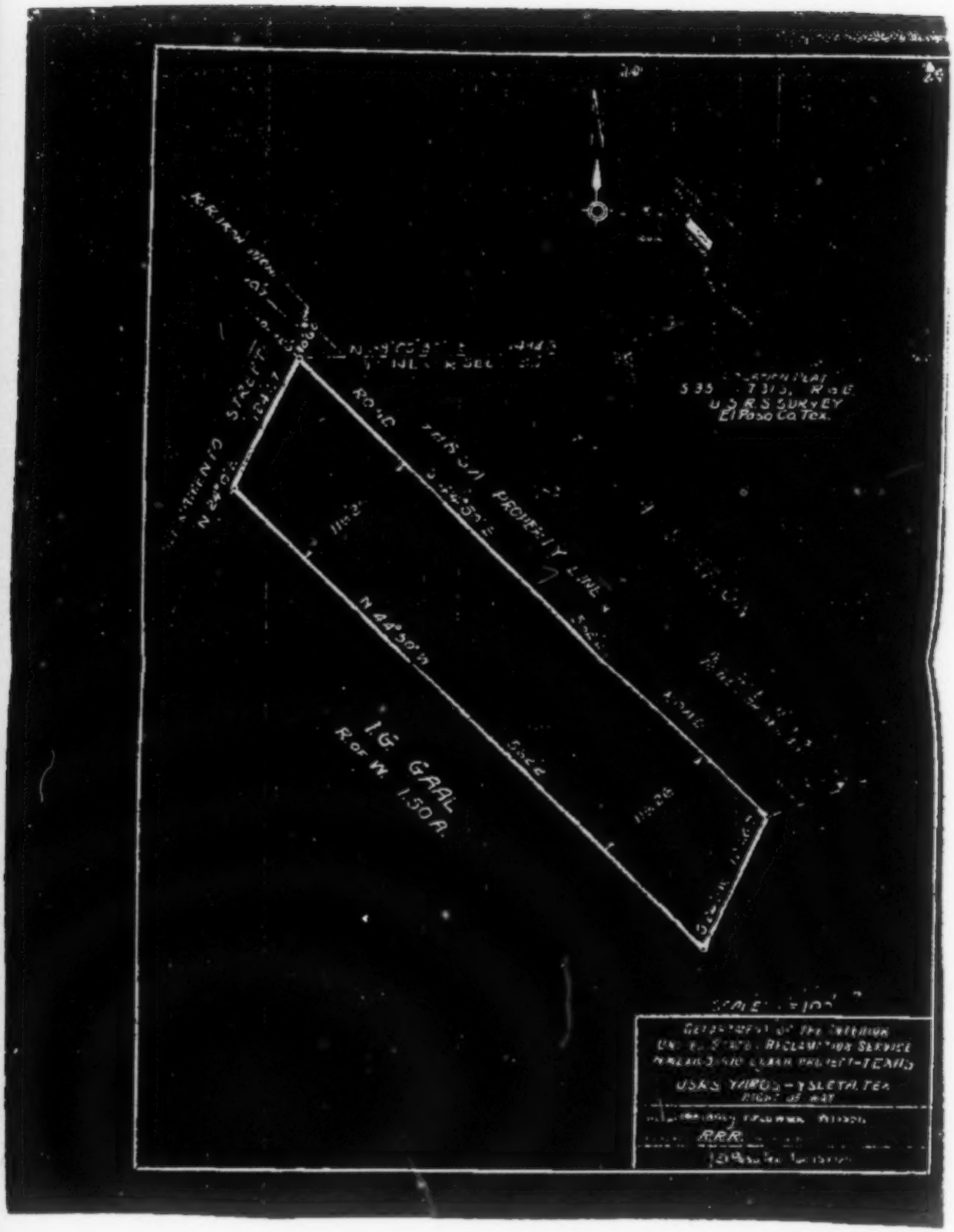
Geo. W. Hoadley,
Notary Public, in & for
El Paso Co., Texas.

Filed for Record Apr. 11, 1935 at 4:35 P. M. | W. D. GREET, County Clerk.
And Recorded Apr. 13, 1935 at 9:00 A. M. | By [signature] Deputy.

1-16-96 El Paso, Texas
A true and correct copy I do hereby certify.
HECTOR ENRIQUEZ, JR.
County Clerk El Paso Co. Texas
By [signature] Deputy

-3009

QUIT-CLAIM DEED


R.R. IRON MEN
STREET
ROAD
PROPERTY LINE
N 44°50' W
I.G. GAAL
R. OF W. 1.50 A.
U.S.R.S. SURVEY
El Paso Co. Tex.
USRS YARDS - YSLETA, TEX.
RIGHT OF WAY
R.R.R.

WARRANTY DEED, SINGLE AND WIFE'S SEPARATE ACKNOWLEDGMENT No. 38-A

EXHIBIT B

THE STATE OF TEXAS,
COUNTY OF EL PASO.

Know all men by these presents:

Charles H. Geal and George W. Geal, individually and as Independent Executors of the Estate of I. G. Geal, deceased, Frank Felix Geal and Lillian M. Kies, a single woman

of the County of El Paso, State of Texas, in consideration of the sum of Three Hundred Fifty Dollars ($350.00) - - -

EXHIBIT B

SINGLE ACKNOWLEDGMENT.

THE STATE OF TEXAS,
County of El Paso.

Before me Geo. W. Reedley, a Notary Public in and for El Paso County, Texas, on this day personally appeared Charles B. Gaal and George W. Gaal individually and as Independent Executors of the Estate of I.O. Gaal, deceased, Frank Felix Gaal, and Lillian M. Eden, a single woman known to me to be the person whose names subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated.

Given under my hand and seal of office this [illegible] day of April A. D. 19[illegible]

Geo. W. Reedley

(SEAL) Notary Public in and for El Paso Co., Texas.

WIFE'S SEPARATE ACKNOWLEDGMENT.

THE STATE OF TEXAS,
County of El Paso.

Before me _____ in and for El Paso County, Texas, on this day personally appeared _____ wife of _____ known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same by me fully explained to her, she, the said _____ acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this _____ day of _____ A. D. 19__

CLERK'S CERTIFICATE

THE STATE OF TEXAS,
County of El Paso.

I, W. D. Grant, Clerk of the County Court of said County, do hereby certify that the above instrument of writing, dated on the [illegible] day of April A. D. 19[illegible], with its certificate of authentication, was filed for record in my office this 11 day of Apr. A. D. 19[illegible], at [illegible] o'clock P. M. and duly recorded the 13 day of Apr. A. D. 19[illegible], at 9:00 o'clock A. M. in the records of said County, in Volume 606 on Pages [illegible]

Witness my hand and the seal of the County Court of said County, at office in El Paso, Texas, the day and year last above written.

W. D. Grant
Clerk County Court, El Paso County, Texas.

By A. A. [illegible], Deputy

Frank Felix Gaal
George W. Gaal } Ind. &
Chas. B. Gaal } Ex'rs.
Estate of I.O. Gaal, dec'd

Lillian M. Eden

TO

U. S. of A.

Warranty Deed

Filed for Record the 11th day of Apr. 19 35 at 4 o'clock and 35 minutes P.M.

W. D. Grant, Clerk, El Paso County, Texas

By Spencer [illegible], Deputy

476/35 596/

QUIT-CLAIM DEED, Single and Wife's Sep. Ack. Hills Bros. Printing Co., El Paso

EXHIBIT B

THE STATE OF TEXAS.
COUNTY OF EL PASO.

KNOW ALL MEN BY THESE PRESENTS: THAT

Ye, Chas. B. Gaal, Frank F. Gaal, Geo W. Gaal, and Lillian M. Eden, all married

of the County of El Paso, State of Texas, for and in consideration of the sum of One and 0/100 ($1.00) DOLLARS,

to ~~us~~ in hand paid by the United States of America, pursuant to the Act of Congress dated June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto,

~~of the County of~~ ~~and~~ ~~of~~, the receipt whereof is hereby acknowledged, do by these presents Bargain, Sell, Release and Forever Quit-Claim, unto the said the United States of America, its successors or

~~heirs and~~ assigns all our right, title and interest in and unto that tract or parcel of land lying in the County of El Paso, and State of Texas, described as follows, to-wit:

A tract of land situated in the town of Ysleta, El Paso County, Texas, in the north half of the northeast quarter (N½NE¼) of section thirty-five (35), township thirty-one (31) south, range six (6) east, United States Reclamation Service survey, more particularly described as follows: Beginning at the most northerly corner of the land herein described, which is a point at the intersection of the southwesterly right of way line of a county road parallel and adjacent to the G. H. & S. A. R. R. with the southeasterly line of Sacramento street, from which point the northeast corner of said section thirty-five (35) bears north 88°08'30" east one thousand four hundred thirty-four and eight-tenths (1434.8) feet; thence south 44°50' east five hundred sixty-two and two-tenths (562.2) feet along right of way line of said county road to a point from which the northeast corner of said section thirty-five (35) bears north 66° 43' east one thousand one hundred twenty-nine and sixty-three hundredths (1129.63) feet; thence south 24°0' west one hundred twenty-four and sixty-seven (124.67) feet; thence north 44°50' west five hundred sixty-two and two-tenths (562.2) feet to a point on southeasterly line of Sacramento street; thence north 24°0' east one hundred twenty-four and sixty-seven hundredths (124.67) feet to point of beginning; said tract of land containing one and fifty-hundredths (1.50) acres, more or less;

TO HAVE AND TO HOLD all ~~our~~ right, title, interest, estate and claim in and to the said premises, together with all and singular, the rights, privileges and appurtenances to the same in any manner belonging, unto the said the United States of America, its successors or

~~heirs and~~ assigns forever.

WITNESS ~~our~~ hand this 1st day of March A. D. 1921

~~[illegible]~~

LILLIAN M [illegible]

Chas B. Gaal

Frank F. Gaal

Geo W Gaal

28a

EXHIBIT B

34823

QUIT-CLAIM DEED

SINGLE AND WIFE'S SEPARATE ACKNOWLEDGMENTS

TO

Filed for record, this ... day of ... 19... at ... o'clock and ... minutes ... M.

Clerk

Deputy

THE STATE OF TEXAS.
COUNTY OF EL PASO.

Before me, Jos U Sweeney, a Notary Public in and for El Paso County, Texas, on this day personally appeared Chas B Gaal, Frank F Gaal, Geo W. Gall, and Lillian M Eden

known to me to be the person whose names are subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 4th day of March, A. D. 1921

(SEAL) My com exp June 1 1921

JOS U SWEENEY
Notary Public, El Paso Co. Tex.

THE STATE OF TEXAS.
COUNTY OF EL PASO.

Before me, Jos U Sweeney, A Notary Public in and for El Paso County, Texas on this day personally appeared Lillian M. Eden wife of William H Eden known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Lillian M. Eden, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it

Given under my hand and seal of office, this 4th day of March, A. D. 1921

(SEAL)

JOS U SWEENEY
Notary Public El Paso CO. Texas

My com exp June 1 1921

THE STATE OF TEXAS.
COUNTY OF EL PASO.

I, W D Greet Clerk of the County Court of said County, do hereby certify that the above instrument of writing, dated on the 4th day of Mar, A. D. 1921 with its certificate of authentication, was filed for record in my office this 8th day of Mar, A. D. 1921 at 10:[illegible] o'clock A M. and duly recorded the 15th day of Mar, A. D. 1921 at 3:47 o'clock P M. in the records of said County, in Volume 367 on Pages 232

Witness my hand and the seal of the County Court of said County, at office El Paso, Texas, the day and year last above written.

(SEAL)

W D Greet
Clerk County Court, El Paso County, Texas
By L W [illegible], Deputy

EXHIBIT B

THE STATE OF TEXAS.
COUNTY OF EL PASO.

KNOW ALL MEN BY THESE PRESENTS: THAT

I, I. G. Gual, a Widower,

of the County of El Paso, State of Texas for and in consideration of the sum of One and 00/100 ($1.00) - - -

EXHIBIT B

QUIT-CLAIM DEED

Single and Wife's Separate Acknowledgments

TO

Filed for record this ____ day of ____ 19__ at ____ o'clock and ____ minutes M.

Clerk

By ____ Deputy

THE STATE OF TEXAS
COUNTY OF EL PASO.

BEFORE ME, L. A. Foix J.P. and ex officio Notary Public in and for El Paso County, Texas, on this day personally appeared I. G. Gael

known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 17 day of June A. D., 19 20

(Notarial Seal)

L. A. Foix J.P. and ex officio
Notary Public, El Paso County,
Texas.

THE STATE OF TEXAS.
COUNTY OF EL PASO.

Before me, ____ in and for El Paso County, Texas, on this day personally appeared ____ wife of ____ known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same by me fully explained to her, she, the said ____ acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office, this ____ day of ____ A. D. 19__

THE STATE OF TEXAS.
COUNTY OF EL PASO.

I W D Greet Clerk of the County Court of said County, do hereby certify that the above instrument of writing, dated on the 17" day of June, A. D. 19 20 with its certificate of authentication, was filed for record in my office this 28 day of June, A. D. 1920, at 4:30 o'clock P M and duly recorded the 2 day of July, A. D. 1920, at 3:00 o'clock P M in the records of said County, in Volume 358 on Pages 586

Witness my hand and the seal of the County Court of said County, at office El Paso, Texas, the day and year last above written.

W D GREET
Clerk County Court, El Paso County, Texas.
By L W Amador, Deputy.

EXHIBIT B

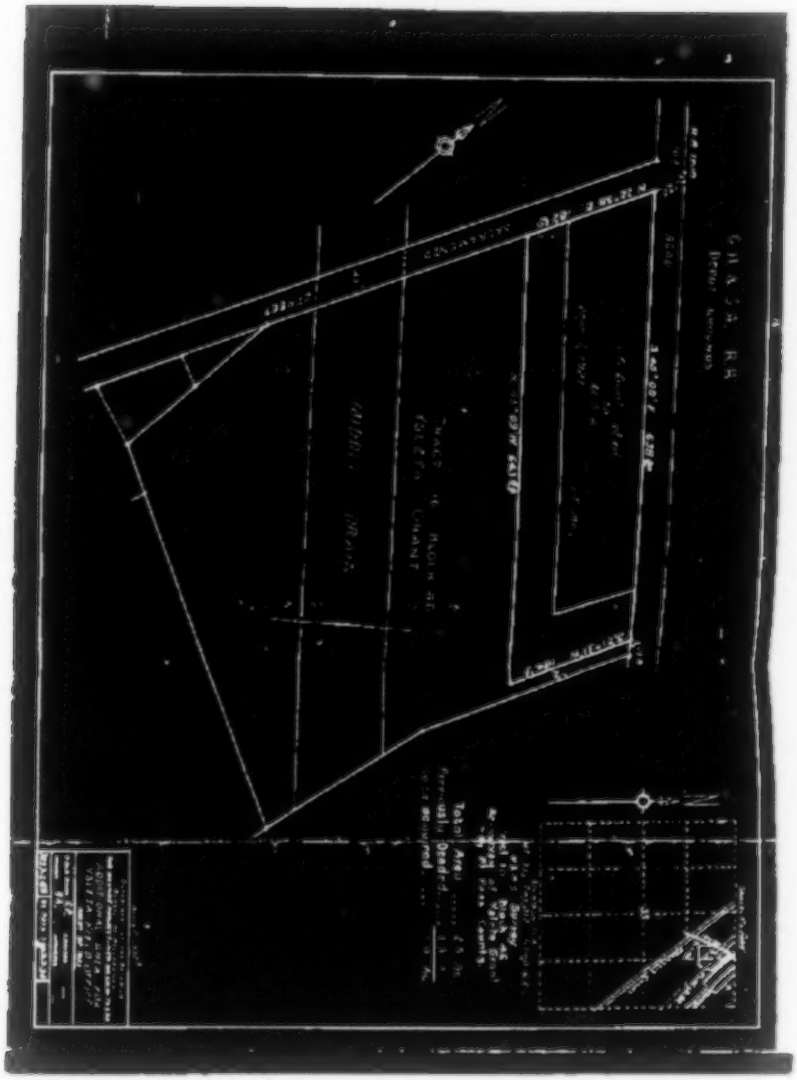


EXHIBIT B

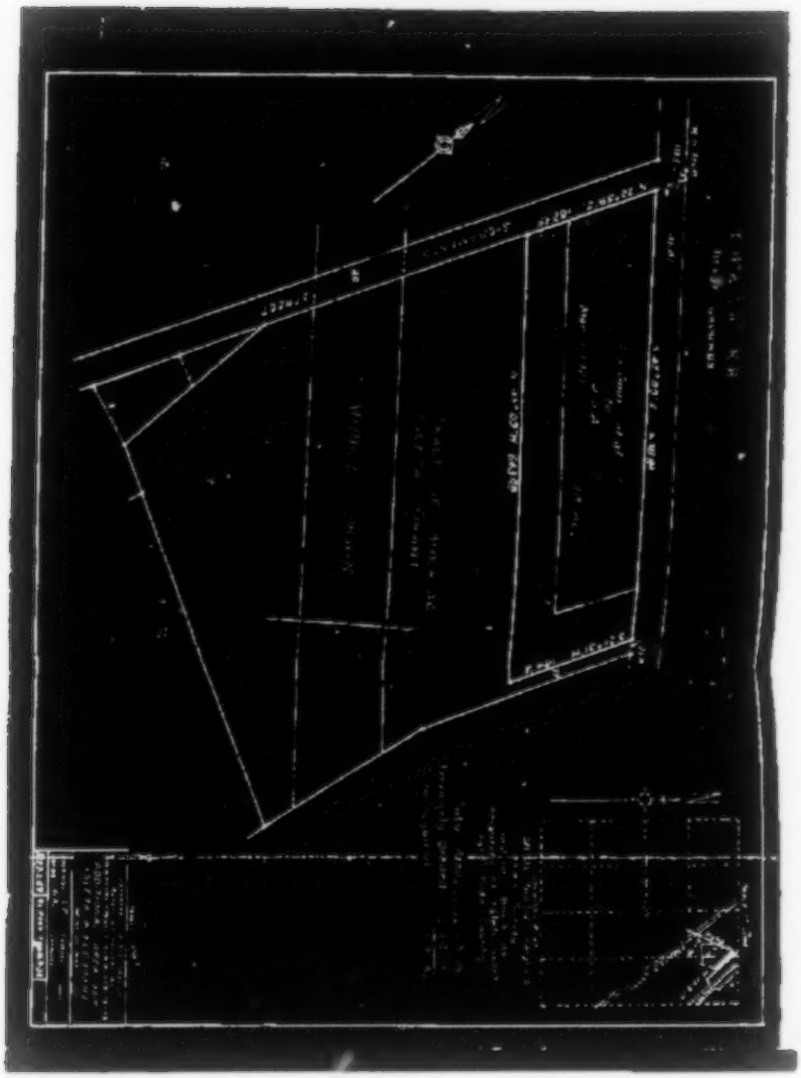


EXHIBIT C

All of those properties described in the following documents and condemnation proceedings, reference to which documents and condemnation proceedings and their places of public record being here made for a complete description, to wit:

1) Land Purchase Contract dated March 17, 1927, signed by I. G. Gaal, et al., recorded April 11, 1927, in Volume 475, Page 611, of the deed records of El Paso County, Texas.

2) Warranty Deed dated August 20, 1918, signed by I. G. Gaal, et al., recorded February 7, 1919, in Volume 169, Page 486, of the deed records of El Paso County, Texas.

3) Warranty Deed dated June 3, 1927, signed by I. G. Gaal, et al., recorded June 8, 1927, in Volume 474, Page 225, of the deed records of El Paso County, Texas.

4) Warranty Deed dated June 3, 1927, signed by I. G. Gaal, et al., recorded June 8, 1927, in Volume 474, Page 230, of the deed records of El Paso County, Texas.

5) Land Purchase Contract dated May 16, 1927, signed by F. G. Alderete, recorded August 1, 1927, in Volume 479, Page 278, of the deed records of El Paso County, Texas.

6) Condemnation of property from J.A. Marquez, dated July 12, 1927.

7) Warranty Deed dated July 12, 1929, signed by I. G. Gaal, recorded August 6, 1929, in Volume 514, Page 591, of the deed records of El Paso County, Texas. Texas

RECORD AND BRIEF

No. 141, Original

Supreme Court, U.S.
FILED
JUN 10 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE

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STATEMENT OF THE CASE

In this original action, Texas seeks enforcement of the Rio Grande Compact (Compact) against New Mexico. The United States has intervened, and New Mexico filed a motion to dismiss both Complaints. The Court appointed A. Gregory Grimsal Special Master on November 3, 2014, and referred the case to him. Elephant Butte Irrigation District (EBID), a political subdivision of New Mexico, moved to intervene in December 2014. *See* Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum of Points and Authorities. New Mexico, Texas, and the United States have all opposed EBID's motion. New Mexico's motion to dismiss and EBID's motion to intervene are currently pending before the Special Master. El Paso County Water Improvement District No. 1 (EPCWID), a Texas political subdivision that receives water from the Rio Grande Project, now also requests leave to intervene in this case. Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as a Plaintiff (EPCWID Mem.).

SUMMARY OF ARGUMENT

EPCWID is now the second political subdivision of a State party to move to intervene in this case. EPCWID is a political subdivision wholly within Texas, serving lands in Texas with contracted water

from the Rio Grande Project (Project), a federal reclamation project. Despite being a wholly intrastate entity of Texas, and having no special interest or role in the Compact, it alleges its interests in the Project are sufficiently unique to justify its intervention in this interstate compact action. EPCWID further claims it is not adequately represented by either its State of incorporation – despite the fact that Texas is a party to the Compact and to this suit – or by the United States, which is also a party to this suit, and with which EPCWID contracts for water from the Project. EPCWID is incorrect. It does not meet the standard for intervention herein.

Compact enforcement actions arise out of a fundamental aspect of State sovereignty: a State's jurisdiction over its water. As such, informed by the doctrine of *parens patriae* and respect for State sovereignty, the Court generally does not allow a citizen of a State already a party to the action to intervene. EPCWID has failed to articulate any reason justifying its intervention here.

Contrary to its claim, EPCWID is not a bi-state entity, nor does it have any role in Compact administration or enforcement. Colorado, New Mexico and Texas are the signatories to the Compact and fully represent their water users with respect to the Compact. EPCWID's position with respect to Texas' Complaint is that of one water user among many others in Texas, all of which draw from Texas's share of water under the Compact. The Court should deny EPCWID's motion because EPCWID's interest is

neither compelling nor unique and its interests are already properly represented by Texas.

ARGUMENT

I. EPCWID FAILS TO MEET THE HIGH STANDARD FOR INTERVENTION IN INTERSTATE COMPACT DISPUTES

"Respect for state sovereignty . . . calls for a high threshold to intervention" by nonstate entities such as EPCWID to guard against the use of the Court's original jurisdiction "as a forum in which 'a state might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). A controversy between States implicates matters of State sovereignty that rise "above a mere question of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). The States alone possess the "core state prerogative to control water within their own boundaries," and the Court's adjudication of their rights under the Compact is informed by the presumption that the States have retained their sovereignty. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-2133 (2013). Thus, a State in its sovereign capacity "represents the interests of its citizens in an original action, the disposition of which binds the citizens." *South Carolina v. North Carolina*, 558 U.S. at 267; *see Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Ordinarily, in a suit by one State against another

subject to the original jurisdiction of this Court, each State 'must be deemed to represent all its citizens.' A State is presumed to speak in the best interests of those citizens. . . .") (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)). Not surprisingly, the Court has never allowed a political subdivision of a State to intervene over the objection of that State in a compact enforcement case.

Therefore "the standard for intervention in original actions by nonstate entities is high – and appropriately so." *South Carolina v. North Carolina*, 558 U.S. at 267. States, in negotiating interstate compacts and in resolving disputes that arise from them, must consider their State needs in their entirety. Individual intrastate entities may disagree with their States on certain positions, but they are necessarily bound by their States whose interests, not those of intrastate entities, are in issue in a compact case. Thus, an intervenor whose State is already a party bears "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). This standard "serves the twin purposes of ensuring that due respect is given to 'sovereign dignity' and providing 'a working rule for good judicial administration.'" *Id.* (quoting *New Jersey v. New York*, 345 U.S. at 373). Unless a nonstate entity can meet this high standard, its motion to intervene generally "will be denied." *Nebraska v. Wyoming*, 515

U.S. at 21-22; *see South Carolina v. North Carolina*, 558 U.S. at 266; Memorandum Opinion of the Special Master on the Motion of Anadarko Petroleum Corporation for Leave to Intervene at 3-6, *Montana v. Wyoming*, No. 137, Original (Dec. 18, 2009).

Moreover, a high standard for intervention is necessary to ensure that original actions, which already "tax the limited resources" of the Court, "do not assume the 'dimensions of ordinary class actions.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). If a nonstate entity could intervene merely on the basis of a difference of opinion with its sovereign, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

As explained below, EPCWID cannot meet either of the prerequisites for intervention. First, it cannot show a compelling and unique interest that sets it apart from the class of all other citizens and creatures of Texas. Second, it cannot show that its interest in this action is not already properly represented. In its own words, any specific interests it may have derive from a reclamation project, not the Compact which is the center of this case.

II. EPCWID'S INTEREST IS NEITHER COMPELLING NOR UNIQUE

EPCWID has failed to show that it has a "'compelling interest'" in its own right, "'apart from [its]

interest in a class with all other citizens and creatures of the state.'" *See South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). EPCWID is a political subdivision of Texas. As such, the only interests that it represents are the interests of irrigators and other water users within its territorial boundaries, which lie wholly within Texas. It is not a bi-state entity, and its claim to have "bi-state interests," *e.g.*, EPCWID Mem. 14, is unfounded. Though the Project serves lands in two States, EPCWID is just the Texas district with no material rights or obligations vis-à-vis the New Mexico lands. EPCWID has presented no other persuasive reason to conclude that it has a compelling interest distinct from the interests of the other citizens and political subdivisions of Texas. Nor is its participation as an intervenor necessary to the resolution of the States' dispute in this action.

A. As a Political Subdivision of Texas, EPCWID Cannot Demonstrate a Compelling Interest in Its Own Right

The Court has consistently held that political subdivisions such as EPCWID, whose States are already parties to original actions, do not meet the high standard for intervention, even where the importance of their interests is substantial. *E.g.*, *New Jersey v. New York*, 345 U.S. at 373-374 & n.* (Philadelphia failed to show a compelling interest, despite representing half of all Pennsylvania citizens in the Delaware River watershed). Political subdivisions

typically are not allowed to intervene because if the Court undertook to evaluate "all the separate interests within [a State]," it "could, in effect, be drawn into an intramural dispute over the distribution of water" within a State. *Id.* at 373; *see also South Carolina v. North Carolina*, 558 U.S. at 274-275 (Charlotte failed to show a compelling interest because it occupied "a class of affected North Carolina users of water," and "the magnitude of Charlotte's authorized transfer d[id] not distinguish it in kind from other members of the class."). A political subdivision's interest in a State's share of an interstate river's water falls "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* at 274 ("[A] State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens.").

EPCWID is in materially the same position as Philadelphia and Charlotte. It concededly is a political subdivision of Texas created pursuant to the Texas Constitution. *See* EPCWID Mem. 1. As a creature of Texas, it is subject to Texas law. *See id.* at 1-2 (stating that EPCWID is "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as counties and other political subdivisions"). Pursuant to Texas law, it is responsible for distributing water to Texas water users, with authority to "'provide for irrigation of

land within its boundaries'" and "'furnish water for domestic, power, and commercial purposes'" to other end users of water in Texas. *Id.* at 2 (quoting Tex. Water Code Ann. § 55.161). EPCWID does not claim to represent the interests or serve the water needs of anyone in New Mexico. Project interests in New Mexico are served by EBID.

EPCWID, like the cities of Philadelphia or Charlotte, thus represents the interests of water users within its territory and is responsible for delivering water to those residents. EPCWID does not "represent interstate interests that fall on both sides of this dispute." *South Carolina v. North Carolina*, 558 U.S. at 274. To the contrary, it "represents the interests of Rio Grande Project water users *in Texas*." EPCWID Mem. 16 (emphasis added). Of necessity, it concedes that Texas also represents all Rio Grande Project water users in Texas. *Id.* at 24 (acknowledging that a "state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens'") (quoting *New Jersey v. New York*, 345 U.S. at 372-373) (quoting *Kentucky v. Indiana*, 281 U.S. at 173-174)). By seeking to intervene in this original action, however, EPCWID claims the very power that the Constitution reserves to Texas: the power to represent the citizens and water users of the State with respect to the adjudication of rights and duties under an interstate Compact. *See* U.S. Const. art. I, § 10, cl. 3. The interests that EPCWID seeks to represent in this Court fall "squarely within the category of interests with respect to which a State

must be deemed to represent all of its citizens." *South Carolina v. North Carolina*, 558 U.S. at 274.

B. EPCWID Is Not a Bi-State Entity or an Entity with Unique Interests Whose Participation Is Necessary to the Resolution of This Action

1. EPCWID Is Not a Bi-State Entity

EPCWID cannot show that it is comparable in any material way to either of the two entities that the Court has permitted to intervene in an equitable apportionment action, *viz.*, the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke Energy). *Id.* at 269-273; *see id.* at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never.").

Unlike a political subdivision of one State dedicated to the interests of water users within that State, CRWSP served the water needs of approximately 100,000 individuals in each of the two States, transferring roughly half of its total withdrawals of water from the Catawba River to South Carolina consumers. *Id.* at 269. It was owned by counties in both States, had an advisory board with representatives from both States, operated infrastructure and assets owned by those counties, received revenues from

water sales in both States, and "relie[d] upon authority granted by both States to draw water from the Catawba River." *Id* at 261, 269. As the Court observed, it was "difficult to conceive of a more purely bistate entity." *Id* at 269.

Duke Energy likewise had a compelling interest that was not specific to one State or the other. It operated 11 dams and reservoirs in both North and South Carolina, through which it generated electricity for the entire region and controlled the flow of the river through the States. *Id.* at 272. There was no other similarly situated entity on the Catawba River. *Id.* Moreover, it had a unique and compelling interest in protecting the terms of its federal regulatory license, which governed the river's minimum flow into South Carolina. *Id.* at 261-263, 272-273. Duke Energy thus had a direct, distinct interest in the subject matter of the equitable apportionment action. *Id.* at 273.

EPCWID argues that it is "similarly situated" to both CRWSP and Duke Energy because it has "bi-state interests" that distinguish it from other water users and creatures of Texas. *See* EPCWID Mem. 14, 16, 18. Unlike CRWSP, EPCWID's authority is granted solely by Texas; EPCWID claims no authority or legal existence in New Mexico. *See id.* at 1-2. EPCWID's supposed bi-state interests are rights adjudicated solely by a Texas State court, as certified by a Texas State agency, to store and release Rio Grande water in New Mexico "for diversion and use in Texas." *Id.* at 18. But a Texas court has no extraterritorial jurisdiction to decree water rights in New Mexico. *See*

Lindsey v. McClure, 136 F.2d 65, 70 (10th Cir. 1943) (State water statutes "have no extraterritorial effect"); *Baker v. General Motors*, 522 U.S. 222, 235 (1998) (State court orders cannot be enforced in a sister State when they purport "to accomplish an official act within the exclusive province of that other State"); *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 924 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (New Mexico appropriation had no "extra-territorial force" in Texas).[1] By EPCWID's own assertion, then, its claimed "bi-state" interest derives solely from Texas, through a Texas court and a Texas agency.

EPCWID also claims to have "bi-state interests" in "the complex system of irrigation infrastructure of the interstate Project," which "crosses (indeed criss-crosses) state lines." EPCWID Mem. at 17-18. According to the Bureau of Reclamation's Official Report to the Rio Grande Compact Commission, however, "the [Rio Grande Project's] irrigation and drainage system is owned, operated, and maintained by [EBID] in the New Mexico portion of the Rio Grande Project and by [EPCWID] in the Texas portion of the Project."

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[1] Even by its own terms, the decree does not purport to grant EPCWID "storage and release" rights in New Mexico; it recognizes these rights solely in the United States. EPCWID Mem. App. 10. The United States appropriated the Project storage rights in New Mexico under New Mexico law. 43 U.S.C. § 383. EPCWID's Texas Certificate of Adjudication recognizes EPCWID's right to use Project water only within Texas. *Id.* at App. 13.

Bureau of Reclamation, *Calendar Year 2012 Report to the Rio Grande Compact Commission* at 47 (March 2013).[2] The fact that canals may cross a stateline is an unremarkable feature of modern irrigation systems. Indeed, EPCWID admits that it provides water exclusively "within EPCWID's boundaries in El Paso County, Texas." EPCWID Mem. 3. As "a political subdivision of the State of Texas," *id.* at 1, EPCWID is therefore a purely Texas entity representing purely Texas interests. It has no bi-state oversight, revenues, sales, customers, or constituents, and it cannot exercise its powers of taxation and eminent domain outside of Texas. It bears no resemblance to a "purely bistate entity" such as CRWSP, and it does not hold the type of bi-state license held by Duke Energy. *South Carolina v. North Carolina*, 558 U.S. at 269.

2. EPCWID's Allocation of Project Water Does Not Give It a Unique Interest

EPCWID argues that it should be allowed to intervene by virtue of "'water-use rights that are not dependent upon the rights of state parties.'" EPCWID Mem. 19 (quoting *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment in part and dissenting in part)). Specifically, EPCWID claims "a right to a certain quantity of water pursuant to [EPCWID's] interests

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[2] Available at https://www.usbr.gov/uc/albuq/water/RioGrande/rpts/Final2012RGCCReport.pdf.

in the Project, its federal reclamation contracts, and the Texas decree." *Id.* Contrary to EPCWID's contention, however, its asserted interest is indeed "dependent upon the rights of state parties." *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment in part and dissenting in part). It is dependent on the rights of Texas, in particular, because "[t]he interests of a State's citizens in the use of water derive entirely from the State's sovereign interest in the waterway." *Id.* at 279. While a political subdivision may hold a real property interest in land to the exclusion of the State in which it is located, EPCWID Mem. 22 (citing *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam)), EPCWID's asserted interest in the waters of the Rio Grande differs from a real property interest in a parcel of land for the "straightforward" reason that "[a]n interest in water is an interest shared with other citizens, and is properly pressed or defended by the State." *South Carolina v. North Carolina*, 558 U.S. at 279 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

EPCWID's interests in the Project and in its federal reclamation contracts with the United States are not exclusive or independent of Texas's sovereign interest in the waters of the Rio Grande under the Compact. To the contrary, as EPCWID elsewhere acknowledges, it receives Project water appropriated by the United States for the Project under the law of Texas for the Texas lands, and delivers that water to identified irrigable lands in Texas. 43 U.S.C. § 383;

Nebraska v. Wyoming, 325 U.S. 589, 629-630 (1945) (recognizing the United States' appropriation of water under Wyoming law for use in both Wyoming and Nebraska). Texas's claim to its "share of water apportioned under the Compact" is properly pressed by Texas alone. EPCWID Mem. 7.

EPCWID has failed to articulate any principled basis for allowing it to intervene that would not also entitle any number of similarly situated entities in New Mexico and Texas to intervene. *See New Jersey v. New York*, 345 U.S. at 373 (recognizing that if Philadelphia were granted intervention, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties"). Not only has another irrigation district, EBID, already sought to intervene, but other political subdivisions, including Hudspeth County Conservation and Reclamation District No. 1 and the City of El Paso in Texas, may seek to intervene as well. All of those entities receive deliveries of Project water. In short, EPCWID does not stand apart from the other public and private entities in the Rio Grande Basin who claim an interest in diverting and using the waters of the Rio Grande. *See South Carolina v. North Carolina*, 558 U.S. at 287 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well – and we will be hard put to refuse them.").

C. EPCWID Has No Role in Compact Administration Nor Any Right Under the Compact Distinct from Other Texas Citizens

The subject of the dispute in this original action is the respective rights the States bargained for and Congress ratified in the Compact. *See* Texas' Complaint ¶¶ 4, 10-28. In compact enforcement cases, like this one, the Court will interpret and apply the compact the States negotiated and ratified on behalf of their citizens. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133, 2135. However, the Compact apportions no water to EPCWID or its New Mexico counterpart, EBID, nor does it confer any rights or obligations on these entities to administer or ensure compliance with its terms. Neither EPCWID nor EBID is mentioned in the Compact. EPCWID has no unique or compelling interest in the meaning or the application of the Compact apart from the interests of the States named as parties to the Compact and as parties to this original action.

EPCWID claims that its "direct stake in the Project supports its intervention." EPCWID Mem. 14-15. But the United States, not EPCWID, owns and operates the Project dams and reservoirs. EPCWID's responsibility, like that of EBID in New Mexico, is to operate Project facilities in Texas and manage Project deliveries to EPCWID's members in Texas. These responsibilities relate to purely intrastate matters that arise only after the States' respective rights under the Compact have been satisfied. In short, EPCWID's

concerns arising from its role as operator of Project facilities in Texas have no relevance to the instant dispute over the respective rights of the signatory States under the Compact. EPCWID thus fails to assert any interest in the Compact that would distinguish it from the class of all other citizens and political subdivisions with an interest in Texas' share of the waters of the Lower Rio Grande.

D. EPCWID's Reliance on Intervention by Nonstate Entities in Other Original Actions Is Misplaced

Though EPCWID claims "unique interests . . . akin to those interests found sufficient to support intervention in prior original action cases," EPCWID Mem. 21, none of the entities that were permitted to intervene in the cases EPCWID cites is analogous to EPCWID. For instance, in *Arizona v. California*, 460 U.S. 605 (1983), the Court allowed several Indian tribes to intervene in a dispute between Arizona and California over the waters of the Colorado River, notwithstanding their prior representation in the case by the United States. Unlike the tribes, whose rights were not subordinate to rights of the United States, EPCWID's right is subordinate to Texas' apportionment of Rio Grande water. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (recognizing that compact apportionment "is binding upon the citizens of each State and all

water claimants").[3] And unlike the tribes, EPCWID is not a sovereign entity in its own right, so the rule of *New Jersey v. New York* squarely applies, as EPCWID acknowledges. *See* EPCWID Mem. 12.

In *Oklahoma v. Texas*, 258 U.S. 574, 580 (1922), and *Texas v. Louisiana*, 416 U.S. 965 (1974), the Court allowed the intervention of nonstate parties in two original actions to resolve conflicting land ownership claims asserted by the nonstate parties, claims whose resolution depended, in turn, on the resolution of boundary disputes between the States. Here, no party has raised any issue concerning EPCWID's land ownership right. EPCWID's rights to water derive from Texas' Compact apportionment, and its right to delivery of that water derived from Project contracts under reclamation law. 43 U.S.C. § 383. *Oklahoma v. Texas* is further distinguishable because it was decided well before *New Jersey v. New York*

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[3] In *Alaska v. United States*, the Special Master found that even Indian Nations could not intervene in an original action where they lacked a direct interest in the litigation in the form of a claim of title to the land, even though they asserted the litigation would affect their ability to use the disputed land and gather important traditional foods. Report of the Special Master on the Motion to Intervene by Franklin H. James, The Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and the Taanta Kwaan Thling-Git Nation, *Alaska v. United States*, No. 128, Original, at 17-18 (Nov. 2001). Like the Nations in *Alaska v. United States*, EPCWID has no direct interest upon which to base its intervention, as the Compact apportions the water among the states, and EPCWID's claims are therefore dependent upon and derivative of Texas' Compact apportionment.

announced the modern rule governing nonstate intervention in original actions.

Moreover, *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), which permitted a number of gas pipeline companies to intervene in an original action challenging a Louisiana tax on natural gas, does not counsel in favor of intervention here. EPCWID argues it is similar to the pipeline companies because its presence as a party "will allow 'full exposition of the issues'. . . . " EPCWID Mem. 22 (quoting *Maryland v. Louisiana*, 451 U.S. at 745 n.21). EPCWID's belief that it can contribute to a "full exposition" of Project issues, *id.*, does not provide a basis for intervention herein, where the only exposition that matters is the States' respective rights in the Compact.

In sum, the States as sovereign parties to an original action presumptively represent all of their "citizens and creatures." *South Carolina v. North Carolina*, 558 U.S. at 266-267. EPCWID has not carried its burden of overcoming that presumption by showing that it has an interest "apart" and different in kind from those of all other citizens and creatures of Texas. *Id.* at 266.

III. EPCWID'S INTEREST IS REPRESENTED BY TEXAS

EPCWID has also failed to show that its asserted interest in this original action "'is not properly represented'" by Texas. *Id.* (quoting *New Jersey v. New York*, 345 U.S. at 373). To reiterate, the Court

presumes that a State in its sovereign capacity represents the interests of all of its citizens and creatures. *Id.* at 267; *Nebraska v. Wyoming*, 515 U.S. at 21-22. The interests of the States in representing all of their citizens and political subdivisions are stronger in an original action arising under an interstate compact than in an equitable apportionment action, because in the former, the States' apportionment agreement is the central question, whereas in the latter, the Court apportions the river among the States under its equitable jurisdiction. Yet, even in an equitable apportionment action, the States are deemed to represent their citizens by virtue of the *parens patriae* doctrine. *South Carolina v. North Carolina*, 558 U.S. at 266. The State's interest as *parens patriae* "has been characterized as a 'quasi-sovereign' interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Even when the State properly acts as *parens patriae*, the "flexible" nature of an equitable apportionment action allows the Court "to seek out the most relevant information from the source best situated to provide it," which may include the individual interests of nonstate entities. *Id.* at 271-272 (citing *Maryland v. Louisiana*, 451 U.S. at 745 n.21).

By contrast, in an original action to interpret and apply an interstate compact, there is nothing "quasi" about the States' sovereign interests. *See Hinderlider*, 304 U.S. at 106 (citing *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837)). The States' sovereign interests in this action derive not from the amorphous "judicial

construct" of the *parens patriae* doctrine, *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601, but directly from their retained sovereignty as acknowledged in the Constitution, U.S. Const. amend. X, and their status as parties to the Compact. Each State, as a signatory to the Compact, "unquestionably" has "a direct interest of its own" and properly takes "full control" of the litigation on behalf of its citizens where the Compact's meaning and application are at issue. *Kansas v. Colorado*, 533 U.S. 1, 8 (2001). As in other contract actions, the Compact's meaning is determined not by way of an open-ended search for input from all available sources, *South Carolina v. North Carolina*, 558 U.S. at 272, but strictly in accordance with the intentions of the compacting parties: "In this endeavor, as with any other contract, the parties' intentions control." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (internal quotation omitted); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("'[A] Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms.") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).

EPCWID argues that its interests "are not adequately represented by Texas in this case" because Texas is not a Project contract holder. EPCWID Mem. 24-25. But EPCWID fails to overcome the presumption that Texas as the signatory to the Compact properly represents the interests of all of its citizens. *New Jersey v. New York*, 345 U.S. at 372. Texas was

among the negotiators and signatories of the Compact and represents EPCWID in *parens patriae* herein. EPCWID's interests in the Project have no bearing on Compact interpretation. Just because Texas is not a named party to the reclamation contracts for the use and distribution of Project water does not mean Texas has no interest in protecting the rights of its citizens, including EPCWID. The Commonwealth of Pennsylvania, in *New Jersey v. New York*, had no direct interest in the City of Philadelphia's water contracts or infrastructure, for which Philadelphia was solely responsible under its Home Rule Charter. 345 U.S. at 374. Despite this, the Court found that Pennsylvania adequately represented Philadelphia's interests because the city's interests were "invariably served by the Commonwealth's position." *Id.* The same is true here.

The very fact that Texas initiated this action demonstrates that Texas has sought and will continue to represent and protect EPCWID's interests with respect to Rio Grande water and this litigation. Indeed, EPCWID seeks the same general relief put forth by Texas: an injunction prohibiting New Mexico from permitting interception and interference with Rio Grande water in New Mexico. *Compare* EPCWID Complaint at 2, *with* Texas Complaint at 15-16. The fact that Texas and EPCWID seek essentially the same relief underscores Texas' ability to fully represent EPCWID's interests in this litigation. *See, e.g.*, Response of the State of Texas in Opposition to Request to Participate in Oral Argument by Amicus

Curiae El Paso County Water Improvement District No. 1, No. 141, Original, at 2 (Apr. 30, 2015) (Texas affirmatively stating that it adequately represents EPCWID and "EPCWID offers no substantive arguments not already presented by Texas").

To whatever extent EPCWID has different views from Texas on particular issues, those differences are not relevant to this Court's determination of Texas' rights and obligations under the Compact. Disagreements between and among the citizens of a State are a fact of life in a pluralistic society. The Court's concern that it not be "drawn into an intramural dispute over the distribution of water" presupposes that disputes within a State can and do exist. *New Jersey v. New York*, 345 U.S. at 373. Intramural disagreements will not justify a nonstate entity's intervention for the precise reason that, if they did, the State "'might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373); *see id.* at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State 'must be deemed to represent *all* its citizens,' not just those who subscribe to the State's position before this Court. The directive that a State cannot be 'judicially impeached on matters of policy by its own subjects' obviously applies to the case in which a subject disagrees with the position of the State.") (quoting *New Jersey v. New York*, 345 U.S. at 372, 373) (additional citation and internal quotation marks omitted). The States properly represent the interests of their

respective citizens and political subdivisions in this Court whether or not they agree on all issues.

CONCLUSION

EPCWID's motion for leave to intervene should be denied.

Respectfully submitted,

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RECORD AND BRIEFS

No. 141, Original

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

REPLY IN SUPPORT OF MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

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v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

REPLY IN SUPPORT OF MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE

INTRODUCTION

El Paso County Water Improvement District No. 1 ("EPCWID") should be granted leave to intervene in this original action interpreting and enforcing the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"), as established in EPCWID's Motion for Leave to Intervene as a Plaintiff ("Motion"). This reply is an omnibus reply to the four responses filed to the Motion, each of which fails to refute EPCWID's demonstration that it has a "'compelling

interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)). The United States ("U.S. Resp."), New Mexico ("N.M. Resp."), and Texas ("Tex. Resp.") each oppose EPCWID's intervention on the grounds that EPCWID does not demonstrate a unique and compelling interest sufficient to support intervention and that Texas or the United States adequately represent EPCWID's interests in this litigation. Colorado took no position on the Motion.

In opposing the Motion, the parties misunderstand or choose to ignore the critical interrelationship of the Rio Grande Project ("Project") and the Compact, and EPCWID's interests and role in the interstate Project. The Rio Grande Compact cannot be interpreted or enforced absent the interpretation and enforcement of rights and obligations under the Rio Grande Project Act, Act of Feb. 25, 1905, ch. 798, 22 Stat. 814, and in the Project in which EPCWID has vital interests. EPCWID's role in the Project is a compelling bi-state interest which is unique from any other Texas water user. Neither Texas nor the United States represent EPCWID's interests. EPCWID should be granted leave to intervene.

ARGUMENT

I. THE PARTIES OPPOSING EPCWID'S MOTION TO INTERVENE MISUNDERSTAND THE INTERRELATION OF THE RIO GRANDE COMPACT AND THE RIO GRANDE PROJECT.

The parties opposing the Motion erroneously argue that EPCWID raises non-Compact issues as a basis for its intervention. *See* U.S. Resp. 11; Tex. Resp. 5. EPCWID fully understands this is a Compact action within the original jurisdiction of this Court, and, as explained in the Motion and Memorandum in Support ("Mem. in Supp."), at 14-16, EPCWID seeks interpretation and enforcement of the Compact to protect the Project and EPCWID's interests therein. The Court must review the Rio Grande Project Act and contracts entered into for operation of the Project in order to interpret and enforce the terms of the Compact. Indeed, Texas's Complaint (leave to file granted Jan. 27, 2014) seeks a declaration of its rights "pursuant to and consistent with the Rio Grande Compact *and* the Rio Grande Project Act," Texas Complaint 15, Prayer ¶ 1 (emphasis added), and an order directing New Mexico to comply with the Rio Grande Project Act and award damages to Texas for violation thereof, *id.* 15-16, ¶¶ 2-3. The Court has decided it has jurisdiction over Texas' Complaint, and it is disingenuous for Texas, and the other parties, to now argue that EPCWID's interests which relate to the Rio Grande Project Act, are not relevant to this case or are otherwise insufficient to support intervention. EPCWID's compelling interest

directly stems from New Mexico's violation of the Compact *and* the Rio Grande Project Act, and cannot be parsed for purposes of interpreting and enforcing the Compact.

EPCWID's rights and interests in the Rio Grande Project, the operation of the Project, and related rights and interests in the Compact cannot be separated so as to preclude intervention. As explained in Texas' Complaint, the protection and integrity of the Rio Grande Project represents what Texas bargained for at the time of the Compact. Texas Complaint ¶ 11 (stating that a fundamental premise of the Compact was that "New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico"); *see* Brief for the United States as *Amicus Curiae* 14 ("If New Mexico's only obligation under the Compact were to deliver water to Elephant Butte, and if New Mexico were then free to allow depletions of the Project water supply available below Elephant Butte, then Texas bargained for little under the Compact."). And, New Mexico's Compact violations are directly and unlawfully impacting the Project. *See* Texas Complaint 15, Prayer ¶ 2(b) (seeking an order directing New Mexico to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project"); United States Complaint in Intervention ¶ 14 ("[E]xtraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water

stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.").

In its response, Texas oddly attempts to minimize the import of the Project to the Compact, stating "[t]he Compact *may* use the Project as a method to accomplish delivery of Texas' apportionment. . . ." Tex. Resp. 14 (emphasis added). But this ignores that the Compact *does* – and was created to – protect the Project and its water supply. *See* Mem. in Supp. 5-6. Texas' assertion that EPCWID's interests in Texas' apportionment of the Rio Grande are "not unique," Tex. Resp. 14, ignores that EPCWID receives Texas' share under the Compact by operation of the Project; EPCWID has federal contracts with regard to its Project allocation; EPCWID owns and operates Project works in both New Mexico and Texas; and EPCWID is ultimately responsible for Project water delivery to water users in Texas. *See* Declaration of Jesus Reyes, General Manager of EPCWID, ¶¶ 4, 8-9, 11, 15, located in the appendix to this brief ("Reyes Decl."), App. 2-6. The Project is not a mere conduit through which water passes freely to Texas and EPCWID. It is essential that the Project function as was intended in 1938 to ensure EPCWID (and thereby Texas) receive what was intended under the Compact. *See* Texas Complaint ¶¶ 11, 18-19; Texas Brief in Support of Motion for Leave to File Bill of Complaint 3.

The Rio Grande Project is an integrated interstate reclamation project, fully dependent on exacting Compact compliance to function. The Project cannot

be and is not operated as segregated units based on the Texas and New Mexico border. Reyes Decl. ¶¶ 5-6, App. 2. EPCWID and Elephant Butte Irrigation District ("EBID") have a shared interest in storage and releases in New Mexico, as water released from storage, supplemented by return flows from New Mexico irrigators, comprises EPCWID's Project water delivery. *See id.* ¶ 4, App. 2. EPCWID has a compelling interest in the determination of the Compact question raised in Texas' Complaint, at ¶¶ 18-19: Can New Mexico interfere with Project releases, which are comprised of New Mexico's Compact deliveries, after New Mexico has made these deliveries? The answer is no, and EPCWID's vital interest in the answer to this question supports intervention in this case.

II. EPCWID SATISFIES THE REQUIREMENTS FOR NON-STATE INTERVENTION IN AN ORIGINAL ACTION.

EPCWID agrees that the standard for intervention of a non-state entity in an original action is whether the entity has a compelling interest unique from other citizens and whether no state can adequately represent the interests of the putative intervener. *See South Carolina v. North Carolina*, 558 U.S. at 266. That standard must be applied in the specific factual context of the original action, and the Court has established no bar to intervention when, under the specific circumstances, the intervener presents a compelling interest. Here, EPCWID has demonstrated

it has a compelling interest in the Rio Grande Compact because of the interrelationship of the Compact and the Rio Grande Project, in which EPCWID has an essential role. This interest is not wholly shared by any other Texas water user, and neither Texas nor the United States can represent EPCWID in this litigation.

A. EPCWID HAS A COMPELLING INTEREST IN THIS COMPACT ACTION BECAUSE OF ITS INTERESTS AND ROLE IN THE INTERRELATED RIO GRANDE PROJECT.

EPCWID is the sole direct beneficiary of the Project in Texas. EPCWID is not claiming Texas' position as a Compact party, *see* N.M. Resp. 8, but seeks to intervene to protect its own interests. Moreover, EPCWID's role in the operation of the Project and interests therein are not limited as the United States has characterized them. U.S. Resp. 10 (stating the United States determines Project water allocation). As explained by the Reyes Declaration and the histories of the Project and the Compact, EPCWID plays a critical role in the operation of the Project, and such role predates the Compact. This interest is unique and compelling and must be represented in this litigation as any interpretation and enforcement of the Compact pursuant to Texas' Complaint will directly impact EPCWID's interests.

EPCWID's role in the Project dates to the early twentieth century. EPCWID's predecessor, the El Paso Valley Water Users' Association ("Association"), was necessarily created in order for the Project to be authorized and begin operations. *See* U.S. Resp. 3. The Association was created in 1905, following Congressional authorization of the Project by the Rio Grande Project Act, to represent water users who would receive water from the Project. *See* Texas Water Code § 55.161(c)(1) (stating EPCWID's purpose includes "cooperat[ing] with the United States under the federal reclamation laws for the purpose of construction of irrigation and drainage facilities necessary to maintain the irrigability of the land"); *see also* U.S. Geological Society, *Third Annual Report of the Reclamation Service 1903-1904*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 54-55 ("[M]any of the [Reclamation] projects under consideration embrace tracts of land in private ownership, and it is necessary to deal at the outset with several hundreds or even thousands of landowners. If the project is carried out, these landowners must ultimately be brought together through an organization for the management and operation of irrigation works. It is found essential to create this organization at an early date, so that instead of dealing with hundreds of individuals separately it will be possible to transact business with one man or with a small committee of men representing all of the water users."). While EPCWID is formed under state law, the basis for its existence is one of federal law and requirements.

Prior to the execution of the Compact, EPCWID and EBID entered into a contract in 1938 and established the proportions of Project water to be allocated to the New Mexico and Texas districts. Reyes Decl. ¶ 6, App. 2; *see also* Appendix to Brief of the United States as *Amicus Curiae* (Dec. 10, 2013) (reprinting the 1938 contract); Texas Brief in Support of Motion for Leave to File Bill of Complaint 2 ("The Rio Grande Project, including the reservation of all necessary water rights, pre-dates the Rio Grande Compact, and is the basis and provides the means for the equitable apportionment of the waters of the Rio Grande between Texas and New Mexico."). Storage, allocation, and release of water from Elephant Butte and Caballo Reservoirs are accomplished pursuant to the 2008 Operating Agreement between the United States, EPCWID, and EBID. Reyes Decl. ¶¶ 11-12, App. 4-5. The parties to the Operating Agreement participate in an Allocation Committee which determines annual allocations. *Id.* ¶¶ 13-14, App. 5. EPCWID, however, determines and directs the timing and magnitude of releases from the Reservoirs to meet the needs of EPCWID for its share of Project water. *Id.* ¶ 13, App. 5. During the irrigation season these decisions are communicated in daily conference calls with the United States Bureau of Reclamation to provide direction regarding the water allocation and releases from Project storage in New Mexico. *Id.*

Each response ignores the role EPCWID actually plays in the interstate operation of the Project, and instead cites cases concerned with state sovereign

or intrastate interests to persuade the Court to ignore that important role. *See* U.S. Resp. 16 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)); N.M. Resp. 15-16 (citing *Tarrant Reg'l Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120 (2013) and *Hinderlider*). These cases do not refute that EPCWID has demonstrated a compelling interest in this dispute about interstate distribution of water and preservation and protection of Project water subject to the Compact. Both cases stand for the unremarkable proposition that water users within each state are bound by the Compacts entered into by their respective States. *See Tarrant*, 133 S. Ct. at 2133; *Hinderlider*, 304 U.S. at 108. EPCWID's intervention is not based on any argument with the substance of the Rio Grande Compact as entered into by Texas. Rather, its compelling interest requiring intervention is to ensure New Mexico complies with the terms of that Compact and that EPCWID's related rights and interests in the Project are protected. EPCWID's interests in the inherently interstate contracts which govern operation of the interstate and international Project are not "akin to private interests" in contracts, as argued by the United States. U.S. Resp. 11. Those contracts are tied to New Mexico's compliance with the Compact, and satisfaction of the rights of the contracting parties is bound up with compliance by the parties to the Compact.

The responses rightly discuss *South Carolina v. North Carolina*, but the United States, New Mexico,

and Texas are all incorrect in their assertions that EPCWID is most similar to the City of Charlotte, the only entity in that case whose request to intervene was denied. *See* U.S. Resp. 13; N.M. Resp. 7-8; Tex. Resp. 22. EPCWID is unlike Charlotte, which had nothing to "distinguish it in kind from other members of the class" of North Carolina water users, and the litigation would not call into question "the viability of Charlotte's operations. . . ." *South Carolina v. North Carolina*, 558 U.S. at 274. *This* litigation, however, will have a direct impact on the Project and EPCWID's operations: EPCWID has a unique and essential role in Project operations both within New Mexico and Texas; EPCWID works with the United States and EBID to determine allocations to each district, when and in what quantity the water is to be released from Project storage, and then delivers that water to its members in Texas, as well as to some EBID members in New Mexico. The root of Texas' Complaint is that New Mexico is violating the Compact by interfering with these essential allocations and deliveries. There is no "class" of similar users in Texas, as discussed below. EPCWID is not a water user at all, but rather a critical entity with critical interests in the very fulcrum of the Rio Grande Compact: the Rio Grande Project. EPCWID is not like Charlotte, but as discussed in the Memorandum in Support, at 15-19, is in a similar position to the two entities allowed to intervene.

If the parties' argument that EPCWID does not satisfy the Court's standard for non-state intervention

prevails, there would *never* be a non-state entity that could intervene in an original action. While the Court has set a high standard for intervention in original actions, it has not established a rule prohibiting intervention of non-state parties. Rather, each case and each request for intervention by a non-state entity must be premised on the specific and unique facts. *See South Carolina v. North Carolina*, 558 U.S. at 270. Indeed, the Court stated "[t]hat the standard for intervention in original actions by nonstate entities is high, however, does not mean that it is insurmountable." *Id.* at 268; *see also id.* at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part) (stating that a private entity could satisfy the *New Jersey v. New York* standard for intervention). EPCWID has "a compelling interest in [this action] that is not fairly represented by the States." *Id.* at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part). The complexity of the facts and law inherent in this original action support and necessitate EPCWID's intervention.

The Project cannot be disaggregated into separate state portions and limit the parties to this litigation to only the state parties to the Rio Grande Compact. The Court recognized this in permitting the intervention of the United States, a non-compacting party, to protect its Project interests. The most recent original jurisdiction case over which the Court has assumed jurisdiction, in fact, names as defendants the state of Tennessee, the city of Memphis, Tennessee, and the Memphis Light, Gas & Water Division.

Mississippi v. Tennessee, No. 220143 (motion for leave to file complaint granted June 29, 2015). The Court has recognized that non-state entities may be critical to resolving interstate disputes, and EPCWID is such a critical entity here.

B. EPCWID'S INTERESTS ARE NECESSARILY AND UNDENIABLY BI-STATE INTERESTS.

The responses erroneously dismiss EPCWID's bi-state interests. Texas claims EPCWID has no bi-state interests because it is a Texas entity whose water interests in the Rio Grande is shared with "all of the other citizens of Texas. . . ." Tex. Resp. 22; *see* U.S. Resp. 13. This argument has no basis in fact or law. As explained in the Memorandum in Support, at 17-18, and herein, while EPCWID is a Texas entity, its creation was necessitated by the authorization of the interstate Rio Grande Project; and its continued existence is dependent on the proper functioning of that Project in *both* New Mexico and Texas. EPCWID has repaid the United States for the construction of that Project which includes the two critical storage reservoirs in New Mexico (Elephant Butte and Caballo). EPCWID's interests relate not just to the functioning, operation, and maintenance of works within the District's boundaries in Texas, but the proper functioning and operation of the entirety of the Project in and through New Mexico. *See* Reyes Decl. ¶¶ 4-7, App. 2-3. Moreover, EPCWID's interests in the Project include Elephant Butte and Caballo

Reservoirs in New Mexico. Simply because the United States holds legal title to the physical reservoirs and dams does not diminish EPCWID's significant interest in the storage and releases of water. Rio Grande Project water is allocated to and belongs to EPCWID (and EBID), not the United States.

EPCWID's role in the Project's integrated, interstate system of water delivery extends beyond daily communications and the direction of actions to be taken in New Mexico. In addition to EPCWID's role and interests in Project storage and releases, water deliveries are made by a system of canals, drains, laterals, and diversion structures that do not obey state borders. Reyes Decl. ¶ 7, App. 2-3; *see also* Elephant Butte Irrigation District's Reply to Briefs Opposing Motion for Leave to Intervene (March 20, 2015), Declaration of Gehrig "Gary" Lee Esslinger, ¶ 21, App. 7, 9 (diagram). This fact is embodied in the 1995 Agreement entered into by EBID and EPCWID for joint operations in New Mexico and Texas ("1995 Agreement"), which recognizes, among other things, that Project works "cross and re-cross the state boundary line between New Mexico and Texas at numerous places." Reyes Decl. ¶¶ 16-19, App. 6-7. Pursuant to the 1995 Agreement, EBID personnel delivers water to Texas users within unit 6A and EPCWID personnel delivers water to all New Mexico users in unit 6B. Both of these units extend at length into New Mexico and Texas respectively. In turn, EBID and EPCWID operate and maintain the Project works in those units irrespective of state lines.

EPCWID's Project interests and obligations are not confined to Texas' border, but extend into and through New Mexico.

Texas attempts to distinguish EPCWID from Duke Energy, one of the entities allowed to intervene in *South Carolina v. North Carolina*, by alleging that the infrastructure owned and operated by EPCWID in both Texas and New Mexico is "not at all like" the infrastructure owned by Duke Energy. Tex. Resp. 23; *see also* N.M. Resp. 12 ("The fact that canals may cross a stateline is an unremarkable feature of modern irrigation systems."). *South Carolina v. North Carolina*, however, did not establish any precedent that EPCWID would only be allowed to intervene if it actually owned Elephant Butte Dam or Reservoir, *see* Tex. Resp. 23, and that would be an absurd result here. EPCWID has repaid the United States for its share of the entirety of Project construction, including the reservoir and dam; it owns and operates all Project works within Texas; operates and maintains significant cross-border infrastructure; and has contracts for its supply of water premised on effective and integrated functioning of the Project in New Mexico and Texas. Reyes Decl. ¶ 8, App. 3. EPCWID's interests in Project infrastructure and operations demonstrate EPCWID has the bi-state interests that satisfy the intervention standard.

C. EPCWID HAS A UNIQUE INTEREST WHICH IS NOT SHARED BY ANY OTHER TEXAS WATER USER AND ALLOWING EPCWID'S INTERVENTION WILL NOT OPEN THE FLOODGATES TO INTERVENTION BY OTHERS.

EPCWID's intervention will not open the floodgates of non-state intervention. Indeed, the only other non-state entity that may satisfy the Court's fact-specific intervention standard is EBID, whose motion to intervene is pending before the Special Master. The parties, however, express concern that there exists "any number of similarly situated entities in New Mexico and Texas," N.M. Resp. 14, who would seek leave to intervene if EPCWID's Motion were to be granted. Only two entities, Hudspeth Conservation and Reclamation District ("Hudspeth") and the City of El Paso ("City"), are identified in the responses as allegedly seeking to intervene if EPCWID is granted leave to do so. EPCWID's intervention, however, would not be precedent allowing Hudspeth and the City to intervene, as EPCWID is a unique entity that delivers Texas' share of Compact water to water users in Texas; there are *no other* entities performing this function.

Texas asserts that EPCWID is similarly situated to "all other water users in the State of Texas" and is "not the only entity within the State of Texas that relies on Rio Grande water or the Rio Grande Project." Tex. Resp. 15; *see also* N.M. Resp. 14 (grouping EPCWID, EBID, Hudspeth, and the City together

because "[a]ll . . . receive deliveries of Project water"). This simplistic characterization of EPCWID contains two glaring fallacies. First, EPCWID is not a water *user* at all; it "distribute[s] and apportion[s] all water acquired by [EPCWID] under a contract with the United States in accordance with acts of Congress. . . ." Tex. Water Code § 55.364. While the Texas Commission on Environmental Quality Certificate of Adjudication ("TCEQ Certificate") recognizes EPCWID "is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year," Motion, App. 10, EPCWID does not use the water itself, but rather delivers and distributes water to its members or contract holders, who in turn place the water to beneficial use. Texas' reliance on *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932), Tex. Resp. 5, is misplaced. In that case, the Court discussed prior decisions in which the Court held *water claimants* – not a water district with contracts with the United States for delivery of Project water to users – were represented by their states. EPCWID, however, is not a water claimant that operates solely within Texas, but delivers water from an interstate project relying on and using infrastructure in two states. *See also* Tex. Resp. 18-19 (relying on *Nebraska v. Wyoming*, 515 U.S. 1 (1995), for a similarly unavailing argument that individual water claimants cannot intervene in an interstate water dispute). Second, EPCWID does not simply "rel[y] on . . . the Rio Grande Project." Tex. Resp. 15. Contrary to Texas' characterization of EPCWID as a mere user who receives water from the Project, the history of the

Project and EPCWID demonstrate that EPCWID is an integral part of the Project, not only a recipient of Project water. Moreover, as explained in Part I, New Mexico's violations of the Compact are directly related to the Project – New Mexico is taking Project water which Texas correctly alleges is protected by the Compact.

The other Texas entities to file *amicus curiae* briefs in this matter – the City and Hudspeth – rely on EPCWID to obtain their water. The City has contracts for Project water with EPCWID, and its Project water delivery is dependent on water availability. *See* Brief of *Amicus Curiae* City of El Paso, Texas in Opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention 2 (Jan. 16, 2014) ("El Paso currently has contracts with [EPCWID] that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project."). The City's right to Project water is solely derivative of EPCWID's interests in the Project. The City has no independent, let alone compelling, interest in the Project and protecting the Project from New Mexico's Compact violations. To say that allowing EPCWID to intervene would prevent a principled distinction between EPCWID and those it supplies with water through federal contracts would require saying that Duke's intervention in *South Carolina* would support the intervention of all users of the power Duke generated. The Court has issued no such ruling, but it has

affirmed its standard to consider the propriety of intervention, a standard EPCWID satisfies here.

Hudspeth has contracts with the United States under the Warren Act, Act of Feb. 21, 1911, Pub. L. No. 61-407, 36 Stat. 925, which governs surplus waters, and not the Rio Grande Project Act. *See* Tex. Resp. 15 n.6. Section one of the Warren Act, codified at 43 U.S.C. § 523, provides that when a reclamation project "storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior . . . is hereby authorized . . . to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems. . . ." As acknowledged by Hudspeth, the water it receives is "Rio Grande Project water in excess of the needs of users within EPCWID, and drainage and return flows from Project Water delivered to EPCWID and used by EPCWID customers." Brief of Hudspeth County Conservation and Reclamation District No. 1 as *Amicus Curiae* in Support of Plaintiff's Motion for Leave to File Complaint 10 (Mar. 11, 2013). EPCWID and Hudspeth are not part of the same "class of affected Texas water users," Tex. Resp. 16, and granting EPCWID leave to intervene will not require Hudspeth to be made a party as well. Permitting EPCWID to intervene will not open the floodgates to other interveners nor make the case resemble an ordinary class action.

D. EPCWID'S INTERESTS ARE NOT REPRESENTED BY A PARTY TO THE ACTION.

Texas and the United States both assert that they can properly represent EPCWID's interests. EPCWID disagrees that either party, much less both, represents EPCWID's unique and compelling interests in this litigation. The United States argues that it can "adequately represent EPCWID's interest in protecting the Project's overall water supply from interception and interference by New Mexico." U.S. Resp. 15.[1] This statement, however, ignores that the United States was permitted to intervene to protect its sovereign interests and not EPCWID's specific interests regarding Project operations and delivery of Project water to comply with its obligations to water users. *See* Mem. in Supp. 26. The TCEQ Certificate provides that the joint certificate holders, the United States and EPCWID, are authorized to divert water in Texas, Motion, App. 10, but it is EPCWID that is authorized to use the Project water to make distributions to its members; and it is EPCWID, not the United States unilaterally, which decides how much should be released from storage in New Mexico and how water should be carried over from year to

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[1] EPCWID did not "simply adopt[] and incorporate[] by reference" the United States' complaint. U.S. Resp. 15. EPCWID specifically conditioned its adoption of the United States' complaint on the allegations and prayer of EPCWID's complaint in intervention. *See* EPCWID Complaint in Intervention, ¶¶ 1, 2.

year pursuant to the 2008 Operating Agreement. *See* Reyes Decl. ¶¶ 12-14, App. 4-5. The United States does not adequately represent EPCWID's interests as it has interests and obligations in the Project as a whole and with regard to deliveries to Mexico. Indeed, to ensure proper operation of the Project, EPCWID was compelled to file suit against the United States in 2007, which resulted in the Operating Agreement currently in place. *See El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. 2007); Motion at 7-8.

Texas asserts that it represents EPCWID as *parens patriae* because EPCWID is a political subdivision that Texas purports to supervise; Tex. Resp. 17; and that "EPCWID's right to water from the Rio Grande Project is derivative and dependent upon Texas' apportionment under the Compact." *Id.* 18. This ignores, however, that the Project – and EPCWID's interest and role therein – predate the Compact by over three decades. The Court must consider the Project, and contracts thereunder, to analyze and interpret the Compact. *See South Carolina v. North Carolina*, 558 U.S. at 273 (finding neither state represented Duke Energy's interests because neither state had signed the relevant agreement "or expressed an intention to defend its terms"). Other water users will be affected and bound by Texas securing its Compact apportionment. But the Court's rulings on the Compact will directly and immediately affect rights in and to the Project, rights

which are unique and vital to EPCWID. EPCWID should be granted leave to protect those unique interests.

New Mexico raises the specter that EPCWID's intervention will cause the Court to be "'drawn into an intramural dispute over the distribution of water.'" N.M. Resp. 22 (quoting *New Jersey v. New York*, 345 U.S. at 373). EPCWID recognizes that this is an interstate Compact dispute, and nothing before the Court would indicate that EPCWID thinks it may assert claims about intrastate distribution of water under Texas law. EPCWID seeks protection of its rights and interests in contracts controlled by federal law and embedded in the Rio Grande Project and the Rio Grande Compact. This case will determine whether New Mexico is complying with its obligations under the Compact, and such compliance is necessary for EPCWID to receive its allocation of Project water. While New Mexico may benefit from the Court characterizing the dispute that underlies this original action as being between Texas and EPCWID and its users, New Mexico's actions are violations of the Compact which are preventing EPCWID from receiving its annual water supply.

Texas also characterizes EPCWID's intervention as bringing an intramural dispute to the Court, stating EPCWID is under a "continuing right of supervision" by the state. Tex. Resp. 10. EPCWID, however, is not seeking relief from any supervision Texas may exercise over Texas water rights under state law. EPCWID seeks to intervene to protect its interests in,

and proper functioning of, the Project and ensure that it receives the water necessary to make all water deliveries to its users. The delivery and use of water *within* Texas is not at issue. EPCWID is unlike the city of Philadelphia, which sought to intervene in *New Jersey v. New York*, causing the Court concern that other political subdivisions or industrial plants would seek to intervene as well. *New Jersey v. New York*, 345 U.S. at 373. Philadelphia sought to intervene to protect its interests in the Delaware River, but the Court denied the motion because the city "represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River. . . . If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* What is at issue in this case is the ability of EPCWID to receive its share of Project water supply as a result of New Mexico's Compact violations. Even if Texas officials have a modicum of authority within the boundaries of EPCWID, no Texas official attempts to supervise any of the operations concerning Project water. Nevertheless, even assuming *arguendo* that Texas has some supervisory authority over EPCWID's use of water in Texas, Texas certainly does not have any supervisory authority or control over that part of Project water supply which must travel through New Mexico in order to reach EPCWID.

A similarly specious argument is that EPCWID seeks to impeach Texas' policy decisions. *See* U.S.

Resp. 10-11; N.M. Resp. 22. EPCWID has filed two briefs *amicus curiae* in support of Texas, and seeks to intervene as a plaintiff. EPCWID's "water use rights . . . are not dependent on the rights of" Texas, however, and thus Texas cannot represent those rights. *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part). The concern that a non-state entity's intervention will cause a state to be "judicially impeached on matters of policy by its own subjects" is not present here. *New Jersey v. New York*, 345 U.S. at 373. EPCWID seeks to intervene to represent its own interests in the Project and related interests in the Compact; it does not seek to impeach Texas' role in the Rio Grande Compact Commission or other policy-making with respect to the Compact.

CONCLUSION

EPCWID satisfies the Court's fact-specific test for non-state intervention and EPCWID's Motion to Intervene should be granted.

Respectfully submitted,

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July 2015

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO, Defendants.

DECLARATION OF JESUS REYES

1. The undersigned hereby makes the following unsworn declaration, under penalty of perjury, pertinent to the above-styled and numbered cause:

2. My name is Jesus Reyes. I am one of ten siblings of the Reyes family who farmed in the upper valley in the County of El Paso, Texas from the early 1940s through 1968. My wife and I own a home with three acres of land and 40 pecan trees. We have been irrigation water users for 38 years. I am employed by El Paso County Water Improvement District No. 1 ("EPCWID"), the proposed intervener, and currently serve as General Manager, a position I have held since 2003. Prior to my employment as the General Manager, I served on EPCWID's Board of Directors for three years.

3. As General Manager of EPCWID, my duties include supervision of all day to day operations of EPCWID. My duties also include overseeing all employees and departments, including all matters relating to water storage, allocation, and releases

from the Rio Grande Reclamation Project ("Project" or "Rio Grande Project") works in New Mexico, and allocation, distribution, and delivery of Project water in New Mexico and Texas.

4. EPCWID has rights to and receives Project water from Project facilities located in New Mexico, more than 100 miles north of the Texas border. EPCWID's rights include a right of storage in Elephant Butte and Caballo Reservoirs, rights to order releases of Project water from such reservoirs, and rights of delivery through both the New Mexico and Texas portions of the Project.

5. The operations of Elephant Butte Irrigation District ("EBID") and EPCWID (collectively, "the Districts") cross state lines with regard to storage and release of water, and delivery of that water. Both of the Districts operate in New Mexico and Texas. The Project could not operate otherwise.

6. The Rio Grande Project cannot be operated as independent units based on the state line of Texas and New Mexico. Project water which is stored and released in New Mexico is fully integrated with Project operations in Texas. Pursuant to a 1938 contract entered into between EPCWID and EBID, and approved by the United States Bureau of Reclamation ("Reclamation"), Project water generally is allocated to Project lands based on the irrigable acreage in New Mexico and Texas, in a ratio of 67/155 to EPCWID and 88/155 to EBID.

7. The Project water used to irrigate the Texas portion of the Mesilla Valley is diverted from the Rio Grande in New Mexico and flows through the

Project works in New Mexico, and ultimately through an irrigation canal that crisscrosses the Texas-New Mexico state line several times before being delivered to Texas lands. EPCWID has easements in New Mexico in canals now owned by EBID that are used to convey Project water to Texas lands.

8. Before 1996, EPCWID completed its repayment to the United States for EPCWID's share of the construction costs of the Rio Grande Project inclusive of the construction of Elephant Butte Dam and Reservoir in New Mexico. Based on that repayment, the United States conveyed to EPCWID most of the Project works in Texas, and easement rights to irrigation and drainage canals located in New Mexico that are used to transport Project water to Texas. That conveyance, called a Deed Without Warranty, dated January 19, 1996, is located in Appendix B to the Brief of the United States in Opposition to El Paso County Water Improvement District No. 1's Motion to Intervene. The deed is a true deed and not a mere "Quit Claim."

9. In 1980, the United States transferred operation and maintenance of the majority of the Project works in Texas to EPCWID pursuant to contract entitled "Transfer of the Operation and Maintenance of the Project Works." The 1980 Contract provided for allocation and delivery of Project water to EPCWID from and through the Project and also required completion of an "operational plan [to] be concluded between the United States and the District setting forth procedures for water delivery and accounting." EPCWID

1980 Contract, section 6.d, located in Appendix A to the Brief of the United States in Opposition to El Paso County Water Improvement District No. 1's Motion to Intervene. The United States retained the operation and maintenance of the Project Reservoirs, Elephant Butte and Caballo, in New Mexico; the bed and banks of the Rio Grande; and numerous diversion dam, flood control structures, the American Canal, and the American Extension Canal in Texas.

10. Reclamation makes releases from Elephant Butte Dam and Reservoir for purposes of delivery of water to Mexico in accordance with the 1906 Convention between the United States and Mexico, but only in coordination with EPCWID and EBID.

11. The allocation and release of Project water in and from Project reservoirs is accomplished pursuant to the 2008 Operating Agreement, an agreement relating to operation of the Project for the Districts among EBID, EPCWID, and Reclamation. The 2008 Operating Agreement was the result of the settlement of a lawsuit brought by EPCWID based in part on the failure of Reclamation to enter into an operating agreement as required by the 1980 contract.

12. Pursuant to the 2008 Operating Agreement, EPCWID, EBID, and Reclamation participate in an Allocation Committee regarding allocations of Project water to the two Districts. Following determination of annual allocations, EPCWID and EBID determine the timing and magnitude of releases from Elephant Butte and Caballo Reservoirs

including the height of the gate opening at Caballo to achieve the desired flow to meet the orders from the Districts with regard to deliveries.

13. During the primary irrigation season, EPCWID participates in daily conference calls with Reclamation to provide direction regarding water allocation and releases from Project storage in New Mexico. The water master for EPCWID, Robert Rios, an EPCWID employee under my supervision, participates in these conference calls. On behalf of EPCWID, he provides information and direction to Reclamation as to how much water Reclamation should release, the timing of such releases, and when and where it is needed, and all other relevant information and direction for purposes of Reclamation to release water in New Mexico for delivery to the Project in Texas. EPCWID provides such information and direction based on conditions on the ground in Texas within EPCWID, anticipated conveyance losses through New Mexico, and information from the EBID water master relating to EBID's New Mexico operations.

14. In advance of the irrigation season and throughout the year, pursuant to the 2008 Operating Agreement, Reclamation and the Districts work together to plan irrigation season water allocations and releases, including allocation of Project water stored in Project reservoirs in New Mexico.

15. In addition to directing Reclamation with regard to allocation, releases, and deliveries, EPCWID operates and maintains Project works in both

New Mexico and Texas, and delivers Project water to New Mexico Project water users, in addition to its Texas Project water users. Project canals, drains, laterals, and diversion structures do not follow state lines. Operation and maintenance of the irrigation facilities that cross the state line is performed by both EBID and EPCWID.

16. On August 9, 1995, pursuant to the Joint Powers Agreement Act of New Mexico and the Interlocal Cooperation Act of Texas, EBID and EPCWID entered into an Agreement ("1995 Agreement"). A copy of the 1995 Agreement, without exhibits, is attached as Exhibit 1 of this declaration.

17. Among the recitals in the 1995 Agreement are the following:

> WHEREAS, prior to the above named contracts, the Bureau of Reclamation was the federal agency that operated and maintained the Project as a whole without regard to the state boundary line and the fact that some of the irrigation drains, canals, laterals and other irrigation works cross and re-cross the state boundary line between New Mexico and Texas at numerous places; and
>
> WHEREAS, since the date of the above mentioned contracts, the parties have continued the previous practice of the Bureau of Reclamation of operating that portion of the Project known as units 6A and 6B (a map showing 6A/6B is attached hereto as Exhibit "C" which transverse aid state boundary line at numerous places as inseverable units

> without regard to such state boundary line, with EBID's personnel delivering water to all uses in unit 6A and EPCWID's personnel delivering water to al [sic] users in Unit 6B; and EBID's personnel and equipment maintaining all Project works in Unit 6A and EPCWID's personnel and equipment maintaining all Project works in unit 6B without regard to the state boundary line and whether said Project works are situate in New Mexico or Texas;. . . .

18. Paragraph 3C of the 1995 Agreement states: "[T]he parties agree that unit 6A will continue to be operated and maintained by EBID and unit 6B operated and maintained by EPCWID. Each party shall have unimpeded access to both units. . . ."

19. Because the Texas – New Mexico state line meanders through units 6A and 6B, some Texas lands receive water delivered by EBID, and some New Mexico lands receive water delivered by EPCWID. Pursuant to the 1995 Agreement, EBID personnel delivers water to all Texas users within what is commonly called unit 6A, and EPCWID personnel deliver water to all New Mexico users in what is commonly called unit 6B. EBID and EPCWID operate and maintain the Project works in those units irrespective of the state line between New Mexico and Texas.

I Jesus Reyes, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Signature /s/ Jesus Reyes

AGREEMENT

THIS AGREEMENT (the "Agreement) made and entered into this 9th day of August, 1995, pursuant to the Joint Powers Agreement Act, being Sections 11-1-1 to 11-1-7, *et seq.*, N.M.S.A. 1978 Comp., (1994 Supp.), and the Interlocal Cooperation Act, Sections 791.001-791.030 of the Texas Government Code, for the purposes and benefits set forth in said statutes regarding the parties hereto. The parties (the "parties") hereto are the Elephant Butte Irrigation District (hereinafter called "EBID") and the El Paso County Water Improvement District No. 1 (hereinafter called "EPCWID").

WITNESSETH:

WHEREAS, EBID is a public district in the State of New Mexico organized pursuant to Section 73-10-1, *et seq.*, N.M.S.A. 1978 Comp., and a public agency as defined in said Joint Powers Agreement Act; and

WHEREAS, EPCWID is a water improvement district organized pursuant to Article XVI, Section 59, of the constitution of the State of Texas and a local government as defined in said Interlocal Cooperation Act; and

WHEREAS, EBID and EPCWID receive water from dams and irrigation facilities built pursuant to the Reclamation Act of 1902, and each of the parties depends upon irrigation works, including canals, drains, laterals, and diversion structures, which are

constructed in both the State of New Mexico and the State of Texas; and

WHEREAS, such irrigation works do not always follow the state boundary lines, and therefore it is economically and practically unfeasible for either of the parties to properly maintain and operate its district and deliver water to its constituents without the cooperation of the other party; and

WHEREAS, EBID took over the function of operation and maintenance of the New Mexico portion of the Rio Grande Project (hereinafter called "the Project"), other than Elephant Butte Dam and Caballo Dam, by contracts with the Bureau of Reclamation dated February 15, 1979 and May 31, 1989 (copies of which are attached hereto and made a part hereof by reference as Exhibits "A" and "B"); and

WHEREAS, prior to the above named contracts, the Bureau of Reclamation was the federal agency that operated and maintained the Project as a whole without regard to the state boundary line and the fact that some of the irrigation drains, canals, laterals and other irrigation works cross and re-cross the state boundary line between New Mexico and Texas at numerous places; and

WHEREAS, since the date of the above mentioned contracts, the parties have continued the previous practice of the Bureau of Reclamation of operating that portion of the Project known as units 6A and 6B (a map showing 6A/6B is attached hereto as Exhibit "C") which transverse said state boundary

line at numerous places as inseverable units without regard to such state boundary line, with EBID's personnel delivering water to all users in unit 6A and EPCWID's personnel delivering water to al users in unit 6B; and EBID's personnel and equipment maintaining all Project works in Unit 6A and EPCWID's personnel and equipment maintaining all Project works in unit 6B without regard to the state boundary line and whether said Project works are situate in New Mexico or Texas; and

WHEREAS, the parties desire the rights and benefits of the above mentioned statutes and enter into this Agreement for the benefits to be derived from said statutes and to confirm and authorize the pre-existing informal arrangements between them; and

WHEREAS, the Congress of the United States passed and the President of the United States signed into law Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), which authorizes the Secretary of Interior to transfer title to the parties to easements, ditches, laterals, canals, drains and other rights-of-way which the United States has acquired on behalf of the Project; and

WHEREAS, under said Public Law 102-525, such transfer of title will be upon agreement of the parties and the Secretary of the Interior, who requires this Agreement between the parties to be formalized prior to said transfer of title; and

WHEREAS, it is in the best interests of the parties to enter into this Agreement in order to efficiently operate and maintain the Project facilities after their transfer to the parties and to secure the benefits of Public Law 102-575.

NOW, THEREFORE, the parties agree as follows:

1. *Purpose.* The parties enter into this Agreement pursuant to and for the purpose of complying with the above mentioned statutes and law and in consideration of the premises and the hereinafter set forth mutual terms and conditions.

2. *Parties to Cooperate.* The parties shall continue to cooperate in a fair and equitable manner to ensure that each party will be able to receive its water after said transfer of title through the same ditches, laterals, canals, drains, and other rights-of-way as it has heretofore and in compliance with the legal and equitable rights of and statutory and contractual obligations affecting each party.

3. *Special Covenant.* A. Each party specially covenants hereby with the other not to cause or permit any interference with or blockage of diversion dams, ditches, laterals, canals, sublaterals, drains, spillways, rights-of-way or any other facilities presently in use by either party, directly or indirectly, or of any other facility which may be necessary, for the transportation of any Project water released from Elephant Butte Dam or Caballo Dam for use by such other party or of any other water lawfully held by or

for the benefit of either of the parties for storage or delivery in or through conveyance facilities. This covenant shall be enforceable by injunction, and any breach shall entitle the injured party to invoke any other remedy to which it may be entitled, either at law or in equity. For so long as the United States and its Department of the Interior Bureau of Reclamation shall have any legal authority or responsibility to act in releasing water from Project storage or diverting Project water, then the United States is hereby granted the authority to invoke the remedies provided herein for the breach of such special covenant. Such covenant and the remedies provided herein shall be effective at such time as this Agreement becomes effective and shall continue until such time as both parties may otherwise mutually agree in writing. Furthermore, this covenant and the remedies provided in this article shall survive the execution and delivery of any deed or deeds to the parties, or either of them, pursuant to the provisions of Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), the Reclamation laws of the United States, or any other applicable law and shall continue until both districts may otherwise agree in writing.

B. The parties have a commonality of interest throughout the Rio Grande Project and, as a consequence, must have access to all Project facilities whether located in New Mexico or Texas in order to protect the interests of their constituents and will, from time to time, be required to travel to and be present at Project facilities in both states.

C. Unless and until a party provides the other party with 120 days prior written notice of that party's cancellation of the provisions of this paragraph, the parties agree that unit 6A will continue to be operated and maintained by EBID and unit 6B operated and maintained by EPCWID. Each party shall have unimpeded access to both units and any requests for maintenance by either party for work in their unit shall be in writing. Ditches, canals, laterals and drains shall be maintained so as to allow for the free flow of water without obstruction. Reports of encroachments by third parties shall be delivered to the District that holds title and said encroachments shall be resolved by the title holder in an expeditious and reasonable fashion. Unless otherwise provided by written agreement signed by both parties, neither party shall impose on the other party any carriage charge in respect of water transported through facilities located within an area being operated, owned or maintained by such party.

4. *Indemnity Against Tort Claims.* Each district agrees to indemnify and hold harmless the other and its officers, directors, agents, servants and employees from and against all loss and expenses, including without limitation all attorney fees awarded by a court and court costs, resulting from any claim for damages from personal injury or property damage arising from or in connection with any act or omission of the indemnifying district, or its officers, directors, agents, servants and employees regardless of where such act or omission is alleged to have occurred. The

parties do not intend for this agreement to create joint and several liability or a partnership.

5. *Liability Insurance.* Each party agrees to carry at all times, at its expense, public liability insurance showing the other party as an additional insured, with minimum combined single limits of $1,000,0000.00 for property damage and/or personal injury. Such public liability insurance may, at the election of the party providing such insurance, provide for a deductible amount of not more than $1,000.00 for each claim, and shall include such other provisions as reasonably may be acceptable to both parties.

6. *Reciprocal Sovereign Immunity.* As to any claim based on an alleged occurrence within the boundaries of the State of Texas, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of Texas applicable to claims against a subdivision of the State of Texas organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas. As to any claim based on an alleged occurrence within the boundaries of the State of New Mexico, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of New Mexico applicable to claims against a public district organized pursuant to Section 73-10-1 *et seq.*,

N.M.S.A. 1978 Comp. It is the intention of the parties to provide the fullest possible reciprocity to each other as to sovereign immunity from claims as is allowed by the present and any subsequent laws of the respective states under whose laws the parties exist.

7. *Payments For the Performance of Governmental Functions.* As provided by Section 791.011(d)(3) of the Texas Government Code, and See [sic] §6-6-11, et seq., N.M.S.A., 1978 Comp., 1991 Repl. Pamp., each party paying for the performance of governmental functions or services pursuant to this Agreement shall make those payments from current revenues available to such paying party.

8. *Funding.* The parties agree further that contributions from the funds of the parties (being public agencies) may be made for the purposes set forth in this Agreement, and that said expenditures shall not be in excess of the value of work performed. That payment of such public funds may be used to defray the cost of implementing the Agreement reached herein. Subject to Paragraph 7 above, the advancement of funds and payment of public funds hereunder shall be done in the ordinary course of the parties' business. The parties further agree that there shall be strict accountability for all funds, receipts and disbursements used to implement this Agreement. The parties agree that the benefits hereunder to each party and the burdens assumed by each party are of equal value.

9. *Accountability.* The parties hereto shall permit the authorized representative of the other party and the State Auditor of New Mexico and State Auditor of Texas to inspect and audit all data and records of the parties hereto relating to the performance of this contract. Both parties agree to keep strict accounting of all receipts and disbursements made in furtherance of this Agreement. Such records shall be available for inspection by the other party and by the public during business hours at the respective offices of the parties hereto.

10. *Waiver.* No waiver of any breach of this Agreement or any of the terms or conditions hereof shall be held to be a waiver of any other subsequent breach; nor shall any waiver be valid or binding unless same shall be in writing and signed by the party alleged to have granted the waiver.

11. *Merger of Contract.* This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and all such covenants, agreements, and understandings have been merged into this written Agreement. No prior statements, representations, promises or agreement of understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement and signed in a writing executed by all of the parties hereto as a modification of this Agreement.

12. *Co-Partners.* Nothing herein contained is intended or should be construed in any way to create or establish the relationship of co-partners between the parties hereto or to establish either party as the agent, representative, or employee of the other for any purpose or in any manner whatsoever. Neither party's employees shall accrue leave, retirement, insurance, or any other benefits afforded to the employees of the other party as a result of this contract.

13. *Equal Opportunity Compliance.* The parties hereto agree to abide by all federal and state laws, rules, regulations, and executive orders pertaining to Equal Employment Opportunity. In accordance with all such rules, laws, regulations, and executive orders, the parties agree to assure that no person in the United States shall, on the grounds of race, color, national origin, sex, sexual preference, age, handicap, or religion be excluded from employment.

14. *Sub-Contract.* Neither party may subcontract any or all of the services called for under this Agreement without the express written permission of the other party first had and obtained. Such written permission shall be liberally and freely given so as to facilitate the operation of the Project in a smooth fashion.

15. *Limitation of Liability.* No elected or appointed official, employee, servant, or agent shall be held personally liable under the terms of this Agreement for the actions called for in this Agreement, it

being the intent of the parties that said persons are acting in the course and scope of their employment or governmental duties and responsibilities.

16. *Term.* This Agreement shall become effective when approved by the Department of Finance and Administration, State of New Mexico. The Agreement shall continue in perpetuity unless terminated by mutual, written agreement of the parties except to the extent that this contract may be canceled in Paragraph 3C above.

17. *Amendment.* This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and approved by the relevant state agencies.

18. *Applicable Law.* The interpretation of this Agreement shall be governed by the laws of the State of New Mexico as to those sections hereof which are related to the Joint Powers Act, and by the laws of the State of Texas as to those sections hereof related to the Interlocal Cooperation Act. Each person signing this Agreement and/or authorizing such a signing on behalf of his/her respective party is acting only in his/her official capacity on behalf of his/her respective party and is not personally liable under any circumstances either jointly or severally for any obligation or liability arising as a result of this Agreement.

19. *Severability.* If any part or application of this Agreement is held to be invalid, the remainder, or its application to other situations or persons, shall not be affected.

20. *No Waiver of Sovereign Immunity.* By entering into this Agreement, EBID and EPCWID seek to obtain the benefits provided for by the statutes cited above. Their employees are "public employees" as defined by the New Mexico Tort Claims Act, Section 41-4-1 to 41-4-29, N.M.S.A. 1978 (1994 Supp.), and the Texas Tort Claims Act, and EBID and EPCWID and their "employees" as defined in said Acts do not waive sovereign immunity, do not waive any defenses and/or do not waive any limitation of liability pursuant to law of their respective states and the above named Acts. No provision of this Agreement waives any of the provisions of the New Mexico Tort Claims Act or the Texas Tort Claims Act, or any act, constitution or law that provides sovereign immunity to the parties or their officers, directors, agents, servants or employees.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

Attest:

/s/ Rudy Provencio
Rudy Provencio,
Secretary

ELEPHANT BUTTE
IRRIGATION DISTRICT

By /s/ John Salopek
John Salopek,
President

Attest:

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

/s/ Indar Singh
Indar Singh
Secretary

By /s/ John Stubbs
John P. Stubbs
President

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION, State of New Mexico

/TM By /s/ James Jimenez Date 9/18/95

RECORD AND BRIEFS

No. 141, Original

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On New Mexico's Motion To Dismiss Texas's Complaint And The United States' Complaint In Intervention And Motions Of Elephant Butte Irrigation District And El Paso County Water Improvement District No. 1 For Leave To Intervene

FIRST INTERIM REPORT OF THE SPECIAL MASTER

A. GREGORY GRIMSAL
Special Master
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70170
(504) 582-1111

February 9, 2017

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No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On New Mexico's Motion To Dismiss Texas's Complaint And The United States' Complaint In Intervention And Motions Of Elephant Butte Irrigation District And El Paso County Water Improvement District No. 1 For Leave To Intervene

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

This original jurisdiction action presents a question of construction of the Rio Grande Compact, a 1938 agreement among the States of Colorado, New Mexico, and Texas, approved by Congress in 1939, and purposed to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas."

Act of May 31, 1939, ch. 155, 53 Stat. 785 [hereinafter 1938 Compact] (attached hereto as **Appendix A**). Although the negotiators of the 1938 Compact intended the compact "to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande," *id.* at 785, that lasting peace has not been achieved, as evidenced by the periodic litigation between signatory States since the compact's ratification. *See, e.g.*, *Texas v. New Mexico*, 342 U.S. 874 (1951); *Texas v. Colorado*, 389 U.S. 1000 (1967).

The United States Supreme Court granted leave to Texas in 2014 to file the instant Complaint, in which Texas claims that various actions of New Mexico deprive Texas of water to which it is entitled under the 1938 Compact. *See Texas v. New Mexico*, 134 S. Ct. 1050 (2014). In its Order granting Texas leave to file its Complaint, the Court also granted New Mexico sixty days within which to file a motion to dismiss the case. *See id.* With leave of the Court, *see Texas v. New Mexico*, 134 S. Ct. 1783 (2014), the United States filed a Complaint in Intervention to protect what it termed "distinctively federal interests" concerning the effect this dispute has on the Rio Grande Project, a federal reclamation project operated by the Bureau of Reclamation of the Department of the Interior on the Rio Grande between Elephant Butte Reservoir, located approximately 105 miles from the New Mexico-Texas border, and Fort Quitman, Texas. (A map of the Rio Grande Basin is attached hereto as **Appendix B**; a

map of the Rio Grande Project, as **Appendix C.**). On April 30, 2014, New Mexico filed its motion to dismiss both Texas's Complaint and the United States' Complaint in Intervention in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. After the parties submitted briefing on the motion to dismiss, the Court referred the motion to me for resolution. *See* 135 S. Ct. 474 (2014).

On December 3, 2014, Elephant Butte Irrigation District filed a motion to intervene as a party to these proceedings, and on April 22, 2015, El Paso County Water Improvement District No. 1 also filed a motion to intervene as a party to these proceedings. After the parties submitted responses to those motions, the Court referred those motions to me for resolution as well. *See* 136 S. Ct. 289 (2015); 135 S. Ct. 1914 (2015).

This First Interim Report of the Special Master addresses those three pretrial motions. As discussed in detail below, I recommend that this Court deny New Mexico's motion to dismiss Texas's Complaint, but grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent it fails to state a claim under the 1938 Compact; rather, to the extent that the United States has stated plausible claims against New Mexico under federal reclamation law, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) and resolve the claims alleged in the Complaint in Intervention for purposes of judicial economy and due to the interstate and international nature of the Rio Grande Project. Finally, I recommend that the

Court deny the motions of the irrigation districts for leave to intervene.

If the Court accepts my recommendations, the next step in this case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of this matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties. Also important is the resolution of the motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 requesting leave to intervene, as the resolution of those motions will assist the parties and the Special Master in establishing the scope and procedure of discovery.

I. Introduction

In its Complaint, Texas alleges that, under the Rio Grande Compact, New Mexico is obliged to deliver "specified amounts of Rio Grande water into Elephant Butte Reservoir" and that, once thus delivered, "that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." Compl., at 2. Texas further alleges that for these beneficiaries to receive the water, "it must be released from Rio Grande Project facilities and allowed

to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas." *Id.* at 2-3.

Texas alleges that New Mexico, through the actions of its officers, agents, and political subdivisions, has allowed the diversion of surface water and pumping of groundwater within the boundaries of New Mexico that is hydrologically connected to the Rio Grande downstream of the Elephant Butte Reservoir, thereby diminishing the amount of water that is released by the Rio Grande Project into Texas by tens of thousands of acre-feet[1] in violation of the 1938 Compact. Texas seeks: (i) declaratory relief as to its rights to the waters of the Rio Grande pursuant to the 1938 Compact; (ii) an order compelling New Mexico to "deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act" and enjoining New Mexico from interfering with or usurping the United States' authority to operate the Rio Grande Project; and (iii) an order awarding damages including pre- and post-judgment interest for injuries allegedly suffered by Texas as a result of New Mexico's actions. Compl., at 15-16.[2]

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[1] An acre-foot of water is enough to cover an acre of land with one foot of water. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 & n.2 (2015).

[2] Colorado is named as a defendant in Texas's Complaint because it is a signatory to the 1938 Compact, but Texas seeks no relief from Colorado. Compl. ¶ 5. Colorado filed limited responses to Texas's motion for leave to file its Complaint and to the United

Similarly, in its Complaint in Intervention, the United States alleges that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts," in violation of federal reclamation law. Compl. in Intervention ¶ 13. The United States also alleges that New Mexico's diversions below Elephant Butte Reservoir negatively interfere with the United States' contractual obligations to deliver water to its consumers, including its obligation pursuant to the Convention of 1906 to deliver water to Mexico. *Id.* ¶¶ 14-15. The United States seeks declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to intercept or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference with Project water. *Id.* at 5.

New Mexico moves to dismiss Texas's Complaint and the United States' Complaint in Intervention for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has

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States' brief as amicus curiae, but filed no response to the United States' motion for leave to intervene.

"allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. to Dismiss at 28 (quoting Compl. ¶ 4). Indeed, New Mexico argues that its *only* duty under the 1938 Compact is to deliver water to Elephant Butte Reservoir. *See id.* at 59 ("New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the United States alleges that New Mexico breached that duty."); *id.* at 61 ("In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte."). New Mexico, therefore, argues that it has no duty under the 1938 Compact "to limit post-1938 development below Elephant Butte" within its boundaries. *Id.* at 45.

New Mexico further asserts that its own state law, not the 1938 Compact, governs the distribution of water released from Elephant Butte Reservoir within New Mexico state boundaries. *See* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation

Act."). Therefore, in the event that the Supreme Court dismisses Texas's Complaint for failure to state a plausible claim under the 1938 Compact (thereby removing the basis for the Court's original jurisdiction over the matter pursuant to 28 U.S.C. § 1251(a)), New Mexico argues that the Court should decline to extend its jurisdiction under § 1251(b)(2) and refuse to hear the United States' Complaint in Intervention because more appropriate venues exist in which the United States may assert its Project claims against New Mexico. *See* Mot. to Dismiss at 63-64.

Assuming Texas's and the United States' allegations of water usurpation are true, with all inferences inuring to the plaintiffs' benefit for the purposes of considering a motion in the nature of a motion under Rule 12(b)(6), to determine whether Texas and the United States have each stated a plausible claim under the 1938 Compact requires me to interpret the plain text and structure of the 1938 Compact, as well as to consider the effect the 1938 Compact's equitable apportionment has upon all other state-law appropriations granted by New Mexico.

However, before presenting my analysis of and recommendations for each of the motions, I move to an explanation of the broader legal context in which this case and the motions arise. Indeed, the "meaning and scope" of the 1938 Compact "can be better understood when the [Compact] is set against its background." *Arizona v. California*, 373 U.S. 546, 552 (1963).

II. Background Principles of Water Law

A. The Doctrine of Prior Appropriation

The States of Colorado, New Mexico, and Texas, like other western arid and semi-arid states, adopted the prior-appropriation doctrine to govern water use within each state. *See* COLO. CONST. art. XVI, §§ 5-6 ("Priority of appropriation shall give the better right as between those using the water for the same purpose. . . ."); N.M. CONST. art. XVI, §§ 2-3 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."); TEX. WATER CODE ANN. §§ 11.021, 11.022, 11.027 ("As between appropriators, the first in time is the first in right.").[3]

"In the humid half of the nation, the right to use water generally depended on the ownership of land adjoining a watercourse." DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY 1848-1902, at 11 (1992) [hereinafter PISANI, RECLAIM A DIVIDED WEST]. As explained by Justice Joseph Story,

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[3] Because of its unique history and the circumstances surrounding its entrance into the Union, as well as its wide range of climates, Texas is actually a dual-doctrine state that recognizes both prior-appropriation and riparian doctrines of water use. *See generally City of Marshal v. City of Uncertain*, 206 S.W.3d 97, 101-03 (Tex. 2006) (describing evolution of Texas water law).

credited for introducing the doctrine of riparian rights to our legal system:

> Primâ facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, usque ad filum acquae. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself.

Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D. R.I. 1827) (Story, J.). Justice Story may have recognized that *any* use by one proprietor would surely prejudice another, because he qualified those statements by introducing

the concept of "reasonable use" of the flow of the stream:

> When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all.

Id.

As western arid and semi-arid territories joined the United States in the mid-nineteenth century, those lands became part of the public domain of the United States.[4] "In theory, the ownership of the public domain

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[4] The ratification of the 1848 peace treaty between the United States and Mexico that ended the Mexican-American War, commonly known as the Treaty of Guadalupe Hidalgo, redrew Mexico's northern border, required the United States to pay $15

in the West by the federal government prevented states from rejecting the common law of riparian rights and adopting a theory of water rights separate from land ownership," one that would recognize water uses that are prior in time as prior in right. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.1 (2011). But "[t]he California mining industry, and specifically its enormous need for capital, transformed water into a species of private property." PISANI, RECLAIM A DIVIDED WEST, at 12. The doctrine of prior appropriation evolved in the mining industry in California and other western arid States as a grassroots method to allocate rights in the absence of the federal government's

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million to Mexico and to discharge claims against Mexico belonging to United States citizens in exchange for the lands west of the Rio Grande comprising parts of what are today New Mexico, Arizona, Nevada, Utah, Wyoming, Colorado, and California. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926. Although Congress admitted Texas as a constituent State of the Union in 1845, Texas's current boundaries were not finalized until the Compromise of 1850, a package of separate bills passing in September 1850, pursuant to which, in pertinent part, California entered the Union, Utah became a Territory, and the Republic of Texas ceded its claims to lands east of the Rio Grande to the United States, including parts of present-day New Mexico, Colorado, Kansas, Oklahoma, and Wyoming, in exchange for $10 million of the Republic's debt. *See* Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446; Act of Sept. 9, 1850, ch. L, 9 Stat. 452; Act of Sept. 9, 1850, ch. LI, 9 Stat. 453. And in 1853, the United States acquired title to the lands south of the Gila River, comprising what is today southern Arizona and New Mexico, for $10 million through the Gadsden Purchase Treaty. *See* Treaty With Mexico Dec. 30, 1853, U.S.-Mex., *amended and ratified* June 30, 1854, 10 Stat. 1031.

assertion of its own right to control the use of the public domain. So, although the California legislature in 1850 adopted the common law as "the rule of decision in all the Courts of this State," which would have meant the application of the riparian doctrine to decide issues of water rights, 1850 Cal. Stat. 219 (codified as amended at CAL. CIV. CODE § 22.2), in 1855, the Supreme Court of California applied the doctrine of prior appropriation as it had evolved in practice to decide the rights of two miners who had each diverted the same stream, *see Irwin v. Phillips*, 5 Cal. 140 (1855).

The *Irwin* court began with the premise that "the lands are the property either of the State or of the United States," but observed that

> [n]o right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other.

Id. at 145-46. The court concluded that both miners' rights were junior to the government as the true owner of the land, but

> that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally

> conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore potior est injure* [sic].

Id. at 147. The Supreme Court of California in later decisions continued to refine the doctrine of prior appropriation to include the requirements of actual and continual appropriation for a beneficial use before rights could vest. *See Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856) ("Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."); *Maeris v. Bicknell*, 7 Cal. 261, 263 (1857) (requiring "an actual appropriation, or intention to appropriate, followed by due diligence" in order to "gain[] a priority over . . . all persons holding under them"); *Thompson v. Lee*, 8 Cal. 275, 280 (1857) (holding that water rights vest from date of notice of appropriation, as long as appropriator followed through with actual use of water for a beneficial use).

The rationales underlying the evolution and spread of the doctrine of prior appropriation throughout the western arid States were explained in 1903 by Elwood Mead, a former State Engineer of Wyoming who would later serve as the head of irrigation investigations for the U.S. Department of Agriculture and Chairman of Reclamation under President Calvin Coolidge:

As many ditches were built about the same time, it became necessary to prescribe rules for determining when the right should attach. If the right should date from the time of actual use of the water, a premium would be placed upon poor construction, and it might happen that during the construction of a large canal smaller canals or those more easily built might be begun and completed and appropriate all the water, leaving the large canal a total loss to its builders. To avoid this the doctrine of relation has been adopted; that is, the right does not date from the time the water is used but relates back to the time of the beginning of the work. To prevent an abuse, this doctrine has been modified by the provision that the work of construction must be carried on with due diligence. Under the doctrine of relation, a water right is initiated when the work of construction begins, and dates from that time, but is not perfected until the water has been actually diverted and used. The question of what is due diligence is a question of fact to be determined in each particular case, and when such diligence is not used, the right dates from the time of use.

. . . .

As scarcity of water led to the adoption of the doctrine of priority, the two led to the necessity of defining the quantity of water to which an appropriator should be entitled. While the early appropriators were entitled to protection in their use of water, the later comers had an equal claim to protection from an

> enlargement of those uses. The first appropriator had the first right, but he had not the right to take all the water he might want at any future time. His right must, in justice to others, be defined as to quantity as well as to time. In theory, beneficial use has been made the measure of a right. That is, each appropriator has a right as against a subsequent appropriator to a continued use of whatever quantity of water he had put to a beneficial use at the time of the acquirement of the subsequent right. What constitutes beneficial use, and the determination of the quantity of water so used, has been left to the courts in most States, and their decisions on these points have been the cause of a large part of the controversies over water rights. This, however, is not a fault of the theory, but of its application.

ELWOOD MEAD, IRRIGATION INSTITUTIONS: A DISCUSSION OF THE ECONOMIC AND LEGAL QUESTIONS CREATED BY THE GROWTH OF IRRIGATED AGRICULTURE IN THE WEST 65-67 (1903) [hereinafter MEAD, IRRIGATION INSTITUTIONS], http://catalog.hathitrust.org/Record/010464135.

"Th[e] general policy [of prior appropriation] was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of [July 26,] 1866, [ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 30 U.S.C. § 51 and 43 U.S.C. § 661)]." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). "This provision was 'rather a voluntary recognition of

a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.'" *Id.* at 155 (quoting *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879)). "And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude," *id.*, the Act of July 9, 1870, amended the Act of 1866 to reflect that "[a]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under [the Act of 1866]," ch. 235, § 17, 16 Stat. 217, 218 (codified as amended at 30 U.S.C. § 52 and 43 U.S.C. § 661).

As explained by the Supreme Court, Congress understood that, to encourage settlement and reclamation of the arid Western States, "an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers." *Cal. Or. Power Co.*, 295 U.S. at 157. Indeed,

> it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come was separated

> from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that appropriation. . . .
>
> In the light of the foregoing considerations, the Desert Land Act [of 1877] was passed. . . . By its terms, not only all surplus water over and above such as might be appropriated and used by the desert land entrymen, but 'the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

Id. at 157-58 (quoting Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321)). In sum,

> [u]nder [the prior-appropriation] doctrine the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to rights already held in the stream.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 98 (1938); *see also Arizona v. California*, 373 U.S. 546, 555 (1963) ("Under [the prior appropriation doctrine], the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle.").

But as the prior appropriation doctrine permeated throughout the western arid States, not everyone believed the doctrine of prior appropriation to be a panacea for establishing water use rights or resolving subsequent disputes. As an example, prior to Congress's passage of the Desert Land Act of 1877, which abrogated common law riparian rights on federal public lands to make way for the doctrine of prior appropriation to determine water use rights, Chief Justice Decius Wade of the Montana Supreme Court cautioned against the consequences of wholesale adoption of the doctrine of prior appropriation:

Now, if the doctrine of prior appropriation is to prevail, this consequence must inevitably result: A few men will locate their farms near the mouth of a stream and appropriate the waters thereof, and any subsequent locators up the stream would be guilty of a trespass if they undertook to use any of the waters thereof, and an action could be prosecuted and maintained against them. The result is, that thousands of acres in our valleys must remain barren deserts, while, with an equal and just distribution of water, all might be cultivated. Thus the prior appropriator renders vast tracts of land utterly worthless, and their sale is lost to the government and their cultivation to the people. Such a doctrine is against public policy and cripples the life of the industries of the Territory.

. . . .

It is well known to any individual who has resided in this Territory for one season, that there is not sufficient available water in the Territory for the purposes of irrigation, and if the doctrine of prior appropriation . . . is to prevail, long before one-tenth part of the tillable land in the Territory is subjected to cultivation the entire available water of the country will have been monopolized and owned by a few individuals, thereby defeating any advance in the agricultural prosperity of the country, and thereby directly repelling immigration thither. . . .

. . . .

> What says the government of the United States to the doctrine that renders the public domain of Montana utterly of no value? The doctrine of prior appropriation robs the general government of its property, by making the government lands of no value. And all these consequences, so disastrous in any view, are to be visited upon Montana, that a few individuals may have what does not now, and never did, belong to them.

Thorp v. Freed, 1 Mont. 651, 677-78, 686-87 (1872) (Wade, C.J., concurring).

Elwood Mead also documented serious systemic flaws in the application of the doctrine of appropriation, identifying inefficiencies, fraud, and confusion in the noticing, recording, and perfecting of water rights claims. *See* MEAD, IRRIGATION INSTITUTIONS, at 67-81.[5]

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[5] As described by Mead:

> A land system which would permit of a score of filings on the same quarter-section, and then leave the claimants to fight for its possession, would not be held in high esteem. The law for recording appropriations of water which places no restrictions on the number or volume of these claims is just as illogical, and is fraught with more serious evil. To say the least, these records are of little value. The clerk or the recorder has to write down whatever is submitted. He has no means of knowing whether a new claim is in accordance with facts, whether a projected work will be carried out, or if it will be a public benefit. No means is provided for ascertaining if the claims recorded have been followed by construction. No provision is made for measuring the flow of streams, in order to know if the amount appropriated is equal to or in excess of the supply. The law says that

He advocated for an administrative permit system to regulate the acquisition, priority, transfer, and termination of water use rights:

> As the demands upon the water-supply have grown, necessity has led to a gradual decrease in the freedom of the appropriator and an increase in the control exercised by the public authorities. . . . The person wishing to use water must secure a permit from a board of State officials, and the right acquired is not governed by the appropriator's claim, but by the license for the diversion issued by the State authorities. This tendency toward public supervision is manifest in the other arid States, and it seems only a question of time

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> the appropriation must be made for a useful or beneficial purpose, but it goes no farther. It provides no methods by which the public may ascertain promptly and inexpensively whether the amount taken out is the amount to which claim was laid, whether it has been applied beneficially or not applied at all. If the claimant proceeds diligently and uninterruptedly with construction and uses the water as described in his notice, he is entitled to the right thereby acquired, and it should be protected without cost to him. On the other hand, if a claim is not completed in accordance with statements of the notice, if the water claimed is not all used or not used in the manner specified, it is equally important that the records show these facts. Unfortunately, the completion of appropriations in accordance with the statements of claims is the exception rather than the rule, in which case the recorded notices are false and misleading and in time acquire a force and standing to which they are not entitled.

MEAD, IRRIGATION INSTITUTIONS, at 78-79.

> when the doctrine of appropriation will give way to complete public supervision.

Id. at 82.

Mead's ideas for using administrative permit systems to regulate water use rights and priorities within each arid state gained traction, resulting in the eventual implementation in many arid states of an administrative permit system to regulate surface water use rights within the boundaries of each state. *See, e.g.*, N.M. CODE R. § 19.26.2; 30 TEX. ADMIN. CODE §§ 295.1-.202, 297.1-.108.

B. The Doctrine of Equitable Apportionment

The preamble of the Rio Grande Compact declares that it was entered into by the signatory states in order to achieve "an equitable apportionment" of the waters of the Rio Grande above Fort Quitman, Texas, that is to say, waters flowing in an interstate stream. *See* 1938 Compact, 53 Stat. 785.

The state-law doctrine of prior appropriation governs intrastate water rights and disputes in western arid States; but an interstate stream used beneficially in each State through which it passes is considered to be "more than an amenity, [but rather] a treasure [that] offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Indeed, all States

through which an interstate stream flows "have real and substantial interests in the River that must be reconciled as best they may." *New Jersey*, 283 U.S. at 342-43. The Harmon Doctrine – that opinion advanced by U.S. Attorney General Judson Harmon in 1895 in response to Mexico's claims pertaining to the usurpation of Rio Grande waters by United States citizens that essentially would allow a sovereign country to dispose of its resources within its own boundaries regardless of the consequences of that action in a neighboring sovereign country – was practically rejected at the time by the U.S. Secretary of State, resulting in the Convention of 1906 between the United States and Mexico apportioning Rio Grande water to Mexico. *See* discussion *infra* Parts III.B.3.-4. & III.C.4. And its application to interstate stream conflicts between quasi-sovereigns was likewise rejected by the Supreme Court first in *Kansas v. Colorado*, 206 U.S. 46, 97 (1907), and has since been consistently rejected. *See Wyoming*, 259 U.S. at 466 ("The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right."); *see also New Jersey*, 283 U.S. at 342-43.

Equitable apportionment, then, as it has evolved through *Kansas v. Colorado* and its progeny, "is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (citing *Kansas*, 206 U.S. at 98; *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931)). Equitable apportionment of the waters of interstate streams, or other natural resources,[6] may be accomplished in one of two ways: (i) judicially, by the Supreme Court of the United States, *see, e.g.*, *Kansas*, 206

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[6] The Supreme Court has also applied the equitable apportionment doctrine to apportion interstate natural resources other than water. *See, e.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) (applying the doctrine to equitably apportion anadromous fish traveling through multiple states). As explained by the Court:

> The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned. The fact that no State has a pre-existing legal right of ownership in the fish does not prevent an equitable apportionment. Conversely, although existing legal entitlements are important factors in formulating an equitable decree, such legal rights must give way in some circumstances to broader equitable considerations. . . .
>
> At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders. Consistent with this principle, States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States. . . .

Id. (internal citations omitted).

U.S. at 97-98;[7] or (ii) legislatively, by interstate compact or other congressional act, *see, e.g.*, *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) ("Such controversies may

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[7] In *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, the Supreme Court commented on its own jurisdiction to equitably apportion interstate streams and decide controversies emanating therefrom:

> For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

304 U.S. 92, 110 (1938) (internal citations omitted). In 1945, the Supreme Court formulated the standard for equitable apportionment that remains intact today, one which does not necessarily require strict adherence to the doctrine of prior appropriation:

> [I]f an allocation between two appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. . . . So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution."); *Arizona v. California*, 373 U.S. 546, 557-65 (1963) (describing Congress's specific apportionment of water to three States via the Boulder Canyon Project Act). As explained by the Supreme Court regarding the latter:

> The compact – the legislative means – adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723-725, 9 L. Ed. 1233.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938) (internal footnotes and citations omitted).

But in equitably apportioning via compact, the States do so "in the shadow of [the Supreme Court's] equitable apportionment power – that is, [the Court's] capacity to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). "Each State's 'right to invoke the original jurisdiction of th[e] Court [is] an important part of the context' in which any compact is made." *Id.* (quoting *Texas*

v. New Mexico, 462 U.S. 554, 569 (1983)). "And it is 'difficult to conceive' that a downstream State 'would trade away its right' to [the Court's] equitable apportionment if, under such an agreement, an upstream State could avoid its obligations or otherwise continue overreaching." *Id.* (quoting *Texas*, 462 U.S. at 569).

As quasi-sovereigns, States entering a compact to equitably apportion an interstate stream have the power to allocate the water among the signatory States in any way they see fit in order "[t]o secure the greatest beneficial use of the water in the stream." *Hinderlider*, 304 U.S. at 108 (internal quotations omitted). For example, in 1922, seven States entered into a compact equitably apportioning the Colorado River and its tributaries between two regions, with each region receiving 7.5 million acre-feet: the Upper Basin, comprising parts of Arizona, Colorado, New Mexico, Utah, and Wyoming; and the Lower Basin, comprising parts of Arizona, California, Nevada, New Mexico, and Utah. *See* Colorado River Compact of 1922, http://www.usbr.gov/lc/region/g1000/lawofrvr.html (last visited Jan. 6, 2017).[8] In 1925, the States of Colorado and New Mexico

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[8] But the States within each Basin could not immediately agree upon each State's share of the water. Therefore, in 1928, "Congress in passing the [Boulder Canyon] Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries." *Arizona v. California*, 373 U.S. 546, 565 (1963) (describing Act of Dec. 21, 1928, ch. 42, 45 Stat. 1057, 1059). Accepting the volumes apportioned by Reclamation (as operator and administrator of the Boulder Canyon Project) through contracts with water users in each of the three States,

equitably apportioned the La Plata River, allowing unrestricted usage by each State for approximately two months of each year and also for the other months of the year, if the mean flow is above 100 cubic feet per second at the state-line gauging station; otherwise, Colorado is required to deliver half of the mean flow below 100 cubic feet per second, and, at all times, the State Engineers have the discretion to rotate the waters when the flow is very low to secure the "greatest beneficial use" of the river. Act of Jan. 29, 1925, ch. 110, 43 Stat. 796, 797. As a last example, in 1951, Montana, Wyoming, and North Dakota allocated the Yellowstone River and its tributaries first by protecting appropriative rights existing as of January 1, 1950, and then by allocating fixed percentages of the remaining unappropriated water of each tributary to each State through which the tributary flows. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663, 666-67.

Because an equitable apportionment by compact represents the work and will of quasi-sovereign States

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Congress apportioned 4.4 million acre-feet of water to California, 2.8 million acre-feet of water to Arizona, and 300,000 acre-feet of water to Nevada, with Arizona and California splitting any surplus. *Id.* at 560-65. In the Act, Congress left open the option for the Lower Basin States to agree upon different terms of apportionment via compact, which would have also required congressional approval, but they never chose that option. *Id.* at 562, 579.

Much later, in 1949, the States of the Upper Basin apportioned by compact to each State a percentage of water of the Colorado River allocated to the Upper Basin. *See* Act of Apr. 6, 1949, ch. 48, 63 Stat. 31.

who each hold title to equitable portions of an interstate stream, the Supreme Court has held that such an apportionment "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).[9] But because each State's share of an interstate stream is limited to an equitable portion thereof, it necessarily follows that the maximum right to appropriate interstate waters that each State could ever confer upon its own citizens cannot exceed that State's equitable share of the stream. *See id.* at 102. As the Colorado high court deduced, it follows that "[e]quitable apportionment, a federal doctrine, can determine times of delivery and

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[9] In so holding, the *Hinderlider* court relied on its reasoning in *Wyoming v. Colorado*:

> But it is said that water claims . . . could not be, and were not, affected by the decree [of equitable apportionment], because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between states, each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado'; and this court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators.

Id. at 107 (quoting *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932)).

sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the water which has not been committed to other states by the equitable apportionment." *Alamosa-La Jara Water Users Protection Ass'n v. Gould (In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries)*, 674 P.2d 914, 922 (Colo. 1983) (en banc), *as modified on denial of rehr'g* (Colo. 1984) (citing *Hinderlider*, 304 U.S. at 106-08).

III. The Historical Context: Events Leading to the Ratification of the 1938 Compact

Whatever their many other differences may be, counsel for the principal adversaries, Texas and New Mexico, appear to agree upon one proposition: namely, that "this compact and how it works and the facts in this case . . . [are] complex. This is a complex system." Hr'g Tr. 71:11-14, Aug. 19, 2015 (SM R. Doc. 37) (statements of counsel for Texas).[10] Similarly, counsel for New Mexico remarked: "[T]his case is much more complex than the *Montana* [*v. Wyoming & North Dakota*, Original 137] case was. . . . People have been fighting over this river for about 400 years and there's a lot of information to be imparted." Hr'g Tr. 20:24-25, 21:3-4, Apr. 23, 2015 (SM R. Doc. 34).

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[10] Citations to the record maintained by the Special Master at http://www.gordonarata.com are designated with the prefix "SM R. Doc."

In their briefs, the parties have recounted the history and current operations of the Rio Grande Project and the history of the Rio Grande Compact. *See, e.g.*, Mot. to Dismiss at 3-14; Texas' Opp. Mot. to Dismiss, at 4-6 (incorporating by reference the history presented in Texas' Brief in Supp. of Mot. for Leave, at 5-18), 41-54; United States' Opp. Mot. to Dismiss, at 4-13. Therefore, in Section III below, I review the historical context of this dispute, with my analysis of and recommendations for each of the motions following in Sections IV-VII. As noted above, the "meaning and scope" of the 1938 Compact "can be better understood when the [Compact] is set against its background." *Arizona v. California*, 373 U.S. 546, 552 (1963).

All the same, in analyzing New Mexico's Motion to Dismiss in Section IV, I conclude that the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the Rio Grande.

A. The Geography of the Upper Rio Grande Basin

The Rio Grande is an 1800-mile interstate and international stream, rising in Colorado, winding southward approximately 400 miles across New Mexico, and crossing into Texas, where it forms the 1250-mile international boundary between the United States and Mexico. *See* NAT'L RES. COMM., REGIONAL PLANNING:

PART VI-THE RIO GRANDE JOINT INVESTIGATION IN THE UPPER RIO GRANDE BASIN IN COLORADO, NEW MEXICO, AND TEXAS 1936-37, AT 7 (1938) [HEREINAFTER RIO GRANDE JOINT INVESTIGATION]. "So far as [the Rio Grande's] history is known it has always been a torrential or storm-water stream, subject at times to great floods and at other times to periods of minimum flow, when its bed was dry or carried an insignificant amount of water along certain parts of its course." U.S. DEP'T OF THE INTERIOR, UNITED STATES GEOLOGICAL SURVEY, THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE 194, H.R. Doc. No. 58-28, at 395 (3d Sess. 1905) [hereinafter 1903-04 THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE]. "The country through which it flows is very fertile, but the rainfall is so meager and so erratic that it is an arid desert and no crops can be raised without artificial irrigation." *Id.*

"With respect to usage of water and the problems concerned with that usage, the river is divided into two distinct sections at Fort Quitman, or at the narrow gorge a few miles below." RIO GRANDE JOINT INVESTIGATION, at 7. The Upper Rio Grande Basin (the area above Fort Quitman, Texas) is comprised of "parts of Colorado and New Mexico, and a very small part of Texas," with "more than 99 percent of the water supply com[ing] from Colorado and New Mexico in about equal amounts." *Id.* "Below, in the lower basin, the river develops its flow mainly from tributaries in Mexico." *Id.* The Upper Rio Grande Basin is naturally divided into three sections: (1) the San Luis section in Colorado, (2) the Middle section in New Mexico, and (3)

the Elephant Butte-Fort Quitman section in New Mexico, Texas, and Mexico. *See id.* This case centers primarily upon events concerning and occurring in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin.

B. The Natural Behavior of the Rio Grande Lends Itself to Boundary and Resource Disputes

1. The Treaty of Guadalupe Hildago creates the International Boundary Commission to handle boundary disputes

The Treaty of Guadalupe Hidalgo, the peace treaty between the United States and Mexico that ended the Mexican-American War, granted to the United States lands west of the Rio Grande comprising parts of what are now New Mexico, Arizona, Nevada, Utah, Wyoming, Colorado, California, and Arizona. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926 [hereinafter 1848 Treaty of Guadalupe Hidalgo]. The treaty created and charged the International Boundary Commission

> to designate the [international] boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the

> expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte.

Id. at 927. Article XXI of that treaty provided that future disagreements between the countries "should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation." *Id.* at 939.

When issues or disagreements regarding the international boundary arose, subsequent conventions between the two countries reconvened the International Boundary Commission and assigned resolution of those disagreements to that commission pursuant to Article XXI of the 1848 Treaty of Guadalupe Hidalgo. For example, a convention ratified in the mid-1880s required the Commission to deal with a specific problem caused, in large part, by the behavior of the Rio Grande. As explained in 1914 by General Anson Mills, then-Commissioner of the International Boundary Commission, to the House of Representatives Committee on Foreign Affairs:

> The Rio Grande is a torrential stream. In our 20 years' investigation we have found no other like it in the world. There are changes in the river brought about by condition that we have found in no other river. In times of flood the river carries, throughout its length, a great deal of water, but frequently it goes dry, sometimes for 200 miles, and in one year there was no water passed for eight months.

> The cause of the organization of this commission was that these changes brought about islands and separate pieces of land, the jurisdiction of which was unknown to either country, and they were a refuge for smugglers, horse thieves, and other criminals, wherein neither country could find the jurisdiction to try them. This created a great deal of trouble for the last 50 years, but the climax came in 1892 when one of the islands or bancos, as they are now called, namely, Banco de Vela, became a subject of contention between the citizens of each side of the river.
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> . . . .
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> Each country provoked the other until the Mexicans arrested three Americans on the island by their officers, carried them across and imprisoned them in jails, and the Americans arrested several Mexicans whom they found on the islands and confined them in jail. Each country appealed to its State Department, and through the War Department, I being in command of the Third Cavalry on the American side of the river, we ordered and placed troops to prevent collision, and the Mexican Fourth Cavalry was likewise by the Mexican Government ordered to align a number of their men on the Mexican si[illegible]

International (Water) Boundary Commission, United States and Mexico: Hearing Before the H. Comm. on Foreign Affairs, 63d Cong. 3-4 (1914) (statement of Gen. Anson Mills), http://babel.hathitrust.org/cgi/pt?id=

chi.45145611;view=1up;seq=5. To address those problems associated with the bancos and other issues stemming from use of the waters of the Rio Grande, an 1884 convention between the countries established the rules for determining the location of the international boundary when the behavior of the Rio Grande transferred tracts of land from one bank of the river to the other. *See* Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where it Follows the Bed of the Rio Colorado, U.S.-Mex., Nov. 12, 1884, 24 Stat. 1011 [hereinafter Convention of 1884].[11] And in 1889, the countries ratified another convention to reconvene the International Boundary Commission and grant

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[11] The jurisdiction issues caused by the bancos were not the only issues affecting relations between the United States and Mexico at that time which the 1884 Convention was meant to address. *See, e.g.*, IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 90 (1987) ("Friction continued to develop over diversions of water and the building of small restraining dams, a condition intensified by the river changing its course at each flood stage."); DOUGLAS R. LITTLEFIELD, CONFLICT ON THE RIO GRANDE: WATER AND THE LAW 1879-1939, at 19-20 (2008) (describing "tensions over irrigation supplies along the border between Texas and Mexico [increasing] to the point that rumors abounded regarding the supposed plans of armed Mexicans to destroy an American diversion dam at Hart's Mill (near present-day downtown El Paso on the Rio Grande)" and the petitions of residents to the El Paso County Commissioners' Court "[c]laiming that over the previous few years the waters of the Rio Grande had become insufficient to irrigate crops and water cattle . . . [and contending] that the shortages had brought immense hardships to the area[; therefore,] they sought a monetary grant to ease their burdens or, alternatively, relief from paying property taxes").

jurisdiction to that body to adjudicate disputes associated with the bancos, man-made diversions of water on both sides of the river, and the location of the boundary line in the context of the principles and rules adopted in the Convention of 1884. *See* Convention Between the United States of America and the United States of Mexico to Facilitate the Carrying Out of the Principles Contained in the Treaty of Nov. 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Bed of the Rio Grande and that of the Colorado River, U.S.-Mex., Mar. 1, 1889, 26 Stat. 1512 [hereinafter Convention of 1889].

2. Resource disputes lead to a plan for an international dam and reservoir on the Rio Grande

Throughout the 1880s, as a result of a significant increase in population and development in the San Luis section of the Upper Rio Grande Basin as well as naturally occurring drought conditions, "water shortages occurred along the Rio Grande in Mesilla and El Paso Valleys and people near Juarez, across the river from El Paso, complained to the Mexican Government." *See* RIO GRANDE JOINT INVESTIGATION, at 8.[12] In 1888,

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[12] Reports from various sources also reported to Congress the problem experienced by residents on both sides of the stream during that time:

> In the report of the troubles on the Rio Grande, transmitted to the House of Representatives by the Secretary of War in 1878, Executive Document No. 84,

Congress appropriated funds pursuant to a March 20, 1888 joint resolution, *see* J. Res. 7, 50th Cong., 25 Stat. 618-19 (1888), to the United States Geological Survey ("USGS")

> [f]or the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for

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Forty-fifth Congress, second session, Colonel Hatch says, among other things:

> One [trouble] which must be looked for sooner or later is in connection with the water taken from the Rio Grande for irrigation, as soon as the attempt is made to largely extend cultivation in this valley (there will not be enough water for all, and both sides have an equal right). From this troubles are certain to arise sooner or later which may involve the two countries seriously.
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> . . . .

Then, in the [1889] report of General Stanley . . . to the Secretary of War, he uses this language:

> Our relations with our Mexican neighbors upon the long line of the Rio Grande have been kindly, although they are good deal excited over what they deem the violation of their riparian rights through our people taking all the water of the Rio Grande for the irrigation of the San Luis Valley, which leaves the Rio Grande a dry bed for 500 miles. The question is one that must be settled by the State Department, and thus far there has been no call for military force.

21 CONG. REC. 2341 (1890) (statements of Sen. Reagan).

> the storage and utilization of water for irrigation and the prevention of floods and overflows. . . .

Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526. At the same time, the city council of El Paso had approached Major Anson Mills, a resident and founder of El Paso and surveyor for the Army Corps of Engineers, to "submit to it a plan for water supply and irrigation that would overcome" the immediate drought conditions the residents of El Paso experienced. Letter from Anson Mills, Major Tenth Cavalry, to Thomas F. Bayard, U.S. Sec'y of State (Dec. 10, 1888), *in* INTERNATIONAL DAM IN RIO GRANDE RIVER, NEAR EL PASO, TEX., H.R. DOC. NO. 54-125, at 3 (1896). Major Mills, who had already received support for his idea from Major John Wesley Powell, the Director of the USGS, proposed to the United States Secretary of State that an international reservoir and dam be built at El Paso, funded jointly by the United States and Mexico, the details of which to be negotiated by

> a joint commission [comprised of members from the two countries] to draw up the necessary treaty stipulations to protect the work and the rights of all interested in them, the fundamental feature of which should certainly be that each nation should have the right to divert no more than one-third of the flow at any period, and that one-third of the flow should be maintained in the bed of the river, and that this international commission have charge and control of the work

> after completion as well as during construction.

Id. at 5.

After working with the USGS to research more thoroughly his idea for a federally funded, international reservoir and dam to solve the irrigation needs of El Paso and Juarez residents, Major Mills testified before a Senate committee in 1889, detailing his thoughts on the location and construction of the project, and also explaining his rationale for federal funding and oversight:

> Now, in regard to the construction of this dam – by whom should it be made – I would like to say this: I do not see how it will be possible to construct it by private enterprise; and for these reasons: It is international, in the first place, and it would be hard to get a charter from the two Governments that would sufficiently secure the investors in their rights to dividends. In our country it is very feasible, because here they can take a lien on the land for the money invested. In Mexico, however, it is different. The proprietors of this enterprise would necessarily be Americans, and there would be that doubt on the part of Mexico and on the part of the investors that they were fairly dealt with. Then, to control the boundary, I do not see how private individuals could do that.
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> . . . .

> My idea would be for the Government to build the dam, build the reservoir, change the railroad, and provide how that water should be disposed of, and turn it over to a private corporation thereafter. That could be arranged.

REPORT OF THE SPECIAL COMMITTEE OF THE UNITED STATES SENATE ON THE IRRIGATION AND RECLAMATION OF ARID LANDS: VOL. III – ROCKY MOUNTAIN REGION AND GREAT PLAINS 16-17 (1890) (statement of Maj. Anson Mills), http://babel.hathitrust.org/cgi/pt?id=chi.73646723;view=1up;seq=7 (last visited Jan. 6, 2017). In addition to presenting a detailed plan for a reservoir and dam at El Paso, Major Mills also identified "a good site for a dam at Fort Selden," approximately sixty miles north of El Paso, near Elephant Butte, New Mexico, but opined that a reservoir at that site would hold a fraction of water compared to the one he proposed at El Paso. *Id.* at 16.

After those hearings, however, legislative attempts to solve irrigation problems by building the dam and reservoir recommended by Mills and the USGS stalled. Congress turned to the President in 1890, requesting him "to enter into negotiations with the Government of Mexico with a view to the remedy of all such [boundary and irrigation disputes]" on both sides of the Rio Grande, which Congress characterized as "a standing menace to the harmony and prosperity of the citizens of said countries, and the amicable and

orderly administration of their respective Governments." 21 CONG. REC. 3977 (1890) [hereinafter 1890 Concurrent Resolution].

3. The Republic of Mexico lodges a formal claim for damages alleging misappropriation of water from the Rio Grande by United States citizens

In October 1894, the Mexican ambassador to the United States forwarded a letter to the U.S. Secretary of State that he had received from the consul of Mexico at El Paso in an attempt "to solicit, very specially, an examination and decision of this grave question by the Department of State, in order that the evils referred to by the Mexican consul at El Paso, Tex., may be remedied." Letter from Matias Romero, Mexican Minister in Washington, D.C., to Walter Q. Gresham, U.S. Sec'y of State (Oct. 12, 1894), *in* THE EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE THIRD SESSION OF THE FIFTY-THIRD CONGRESS 1894-95, at 395 (1895) [hereinafter CLEVELAND FOREIGN RELATIONS PAPERS]. The letter of the Mexican consul detailed tribulations caused by "the numberless drains which have been made by the farmers of Colorado and New Mexico, who have settled the pending questions [regarding the equitable division of the waters of the river] by appropriating the water of the Rio Grande to their own exclusive use." Letter from José Zayas Guarneros, Mexican Consul at El Paso, to Matias Romero, Mexican

Minister in Washington, D.C. (Oct. 4, 1894), *in* CLEVELAND FOREIGN RELATIONS PAPERS, at 396. Those tribulations included the "total destruction within perhaps two years" of agriculture, which, in turn, would "inevitably entail the ruin of the infant industries" and the depopulation of the city of Juarez. *Id.*

Although President Cleveland acknowledged in his annual address to Congress in December 1894 that "[t]he problem of the storage and use of the waters of the Rio Grande for irrigation should be solved by appropriate concurrent action of the two interested countries," CLEVELAND FOREIGN RELATIONS PAPERS, at *xi*, negotiations moved slowly. In October 1895, the Mexican ambassador to the United States sent another letter to the U.S. Secretary of State, complaining that the digging of "a great many trenches . . . in the State of Colorado (especially in the St. Louis [sic] Valley) and in the Territory of New Mexico, through which the Rio Grande and its affluents flow" resulted in the destruction of the navigability of the Rio Grande and the deprivation of water for irrigation downstream in violation of the 1848 Treaty of Guadalupe Hidalgo, the Convention of 1884, and international law. Letter from Matias Romero, Mexican Minister in Washington, to Richard Olney, U.S. Sec'y of State (Oct. 21, 1895), *in* THEODORE ROOSEVELT, JR., MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A REPORT FROM THE SECRETARY OF STATE, WITH ACCOMPANYING PAPERS, IN REGARD TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE [hereinafter ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE

WATERS], S. DOC. NO. 57-154, at 7-8 (1903). As stated by the ambassador in his letter:

> The Government of Mexico thinks that according to Article VII of the treaty of Guadalupe Hidalgo of February 2, 1848, the inhabitants of one country [cannot], without the consent of the other, build any works that obstruct or impede navigation in international rivers, and nothing could impede it more absolutely than works which wholly turn aside the water of those rivers. It is true that Article IV of the treaty of Mesilla of December 30, 1853, annulled Article VII of the treaty of Guadalupe Hidalgo, but at the same time it left its stipulations in force, as far as the Rio Grande is concerned, from the point where that river begins to be the boundary line between the two countries, and moreover, by Article V of the convention of November 12, 1884, the right of both countries to that river was again recognized, and it was again stipulated that one could not construct any works that obstructed navigation therein without the consent of the other.
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> . . . .
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> Still, even supposing, without admitting it, that the Mexican Government's interpretation of the treaties were not well founded, and even if there were no stipulation on this subject between the two countries, the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to

> the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.

Id. at 8.

The U.S. Secretary of State requested a legal opinion from the U.S. Attorney General regarding the validity of Mexico's claims. *See* Letter from Richard Olney, U.S. Sec'y of State to Judson Harmon, U.S. Att'y Gen. (Nov. 5, 1895), *in* ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, at 9-10. Attorney General Harmon agreed that the Treaty of Guadalupe Hidalgo and the Convention of 1884 protected the rights of Mexico as to maintaining the *navigability* of the Rio Grande, but opined that those agreements applied only to the section of the river serving as the boundary between Mexico and the United States, observing that Mexico's claims pertained to interference with irrigation – not navigability of the river. *See* Letter from Judson Harmon, U.S. Att'y Gen., to Richard Olney, U.S. Sec'y of State (Dec. 12, 1895), *in* ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, at 10-13. As to the validity of Mexico's claim under international law, Attorney General Harmon analyzed several legal authorities pertaining to natural international servitudes and the overlay of the principle of absolute sovereignty of nations. *Id.* at 14-16. Ultimately, relying primarily upon Chief Justice John Marshall's opinion

in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), he advised:

> The fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said:
>
> > The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
> >
> > All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
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> . . . .
>
> It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water, or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid

> country through which the river, never large in the dry season, flows, giving much and receiving little.
>
> The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from consideration of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Id. at 15-16 (internal citation omitted).[13] In sum, Attorney General Harmon's opinion stated that the United

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[13] The concept that a sovereign country may dispose of its resources within its own boundaries regardless of the consequences of that action in a neighboring sovereign country became known as the "Harmon Doctrine." In his article questioning the Harmon Doctrine's inclusion in international law, Professor Stephen McCaffrey writes:

> It is remarkable that Attorney General Harmon rested his entire case upon two brief paragraphs from an old Supreme Court decision that he did not proceed to apply to the facts before him. It is true that the Supreme Court's opinion was written by one of the greatest jurists ever to sit on the Court, Chief Justice John Marshall. But could such a great judge, even in the early years of the nineteenth century, have in fact intended to make pronouncements about sovereignty that are as absolute and inflexible as they appear to be in Harmon's opinion? Reading two sentences beyond the end of Harmon's quotation from the decision supplies the answer. Chief Justice Marshall wrote:
>
> > The world being composed of distinct sovereignties, possessing equal rights and equal

States had no duty toward Mexico regarding the alleged water misappropriation by U.S. citizens.

4. The Harmon Doctrine is rejected in favor of referring the international dispute to the International Boundary Commission for amicable solutions

Despite the advice contained in Attorney General Harmon's opinion, the State Department continued to work toward a solution. Ultimately, pursuant to the 1890 Concurrent Resolution, the countries issued a

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> independence, whose mutual benefit is promoted by intercourse with each other, . . . all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . . .
>
> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

Marshall thus recognized that the realities of the international intercourse and interdependence meant that states often did not insist upon "that absolute and complete jurisdiction within their respective territories which sovereignty confers."

Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 725, 744 (1996) (quoting *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136-37 (1812)).

protocol on May 6, 1896, referring the issue of Mexico's claim to the International Boundary Commission for investigation and report on three specific topics:

> It being essential to the conduct of the negotiations contemplated by the concurrent resolution of the Congress of April 29, 1890, that there should be a definite and authoritative ascertainment of the facts relating to the irrigation of the arid lands in the valley of the Rio Grande River, to the construction of a dam across said river at El Paso, Tex., and to the other subjects [*sic*] matter of said resolution:
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> And the Mexican Government deeming that it is of vital interest for the Republic and especially for the inhabitants of the right bank of the Rio Bravo (Grande) to contribute for their part to preparing the means for carrying out the negotiations recommended in the aforesaid resolution of the Congress of the United States of America;
>
> Col. Anson Mills and Señor Don F. Javior Osorno, members of the International Boundary Commission organized under the convention of March 1, 1889, are hereby requested and directed to investigate and report, as soon as practicable, upon the questions and matters following, to wit:
>
> 1. The amount of water of the Rio Grande taken by the irrigation canals constructed in the United States of America.
> 2. The average amount of water in said river, year by year, before the construction

> of said irrigation canals and since said construction – the present year included.
>
> 3. The best and most feasible mode, whether through a dam to be constructed across the Rio Grande near El Paso, Tex., or otherwise, of so regulating the use of the waters of said river as to secure to each country concerned and to its inhabitants their legal and equitable rights and interests in said waters. . . .

Protocol Relating to the Irrigation of the Arid Lands in the Valley of the Rio Grande River and to the Construction of a Dam Across Said River, Mex.-U.S., May 6, 1896, *reprinted in United States-Mexico Water Boundary: Hearings Before the Comm. on Foreign Affairs Relative to the International (Water) Boundary Comm'n, United States and Mexico*, 63d Cong. 38 (1914), http://catalog.hathitrust.org/Record/100734841 (last visited Jan. 6, 2017).

Based upon a request from Anson Mills as Commissioner of the International Boundary Commission,[14] the Secretary of the Interior of the United States directed the Commissioner of the General Land

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[14] *See* Letter from Anson Mills, Col., Third Cavalry, U.S. Army, to Richard Olney, U.S. Sec'y of State (Nov. 17, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 11-14 (1898).

Office in December 1896 "to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructed by this department." Letter from D.R. Francis, Sec'y of the Interior, to Comm'r of the Gen. Land Office (Dec. 5, 1896), *in* WALTER L. FISHER, LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING, BY DIRECTION OF THE PRESIDENT, ORDERS AND REGULATIONS OF THE INTERIOR DEPARTMENT TOUCHING USE, APPROPRIATION, OR DISPOSITION FOR IRRIGATION OF THE WATERS OF THE RIO GRANDE AND ITS TRIBUTARIES IN COLORADO AND NEW MEXICO [hereinafter FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE], H.R. DOC. 62-39, at 2 (1911); *see also* 66 CONG. REC. 593 (1924) (attaching letter as Exhibit E).[15]

The International Boundary Commission issued its report on November 25, 1896, and reported increases in irrigation of acreage in Colorado and New Mexico from 1880 to 1896, directly resulting in a marked decrease in annual flow of the river at El Paso:

> From the very elaborate statistical report of Civil Engineer Follett the commission finds that prior to 1880 there were in Colorado 511

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[15] The perpetual nature of the December 1896 embargo preventing new grants of rights-of-way would become the significant source of contention years later for irrigators in Colorado's San Luis Valley and the Middle section of the Upper Rio Grande Basin in New Mexico. *See* discussion *infra* Part III.E.

canals taken from the Rio Grande and its tributaries, irrigating about 121,000 acres of land; that this number of canals and amount of land irrigated has kept increasing year by year, many of the canals being enlarged during the same period, so that the number of canals at this date has increased to 925, irrigating 318,000 acres of land; and that in New Mexico there were, prior to 1880, 563 canals taken from the Rio Grande and its tributaries, irrigating 183,000 acres of land, and at the present time there are 603 canals, irrigating 186,000 acres of land.

These results show an aggregate of 1,074 canals taken out in Colorado and New Mexico prior to 1880, and 1,528 taken from the river and its tributaries at this date, showing an increase of 454 canals and of 196,000 acres irrigated in the State of Colorado and Territory of New Mexico. This shows quite accurately the increase for the past sixteen years. There are no reliable records available showing the increase in the preceding years, but they were doubtless on a more rapidly increasing ratio.

It will also be observed that the greatest increase during these sixteen years was in the State of Colorado, the number of canals and acres irrigated remaining almost stationary in New Mexico for that period, but this is easily accounted for by the fact that the appropriation of water in Colorado has rendered such a scarcity in New Mexico that little further increase of canals and acreage was profitable.

> It is evident to the commissioners that as the flow of water in the Rio Grande had not only become scarce at El Paso, but high up in New Mexico prior to 1888 or 1889, any increase of water used in Colorado would diminish materially the flow at El Paso during the irrigation season.
>
> . . . .
>
> [Based on] the large mass of information and statistics taken by our engineers [to answer the question charged to the International Boundary Commission regarding the average amount of water in the Rio Grande, year by year, before and after the construction of irrigation canals in Colorado and New Mexico to date], we form the following conclusions:
>
> That the flow of the river at El Paso has now been decreased by the taking of water for irrigation by canals constructed in the United States of America, about 1,000 second-feet for one hundred days annually, equal to 200,000 acre-feet of water.

Letter from Anson Mills, Col. Third Cavalry, U.S. Army & Comm'r of the Int'l Boundary Comm'n, John A. Harper, Sec. of the Int'l Boundary Comm'n, F. Javier Osorno, Mexican Comm'r of the Int'l Boundary Comm'n & S.F. Maillefert, Mexican Sec. of the Int'l Boundary Comm'n, to Richard Olney, U.S. Sec'y of State (Nov. 25, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF

STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 38-39 (1898) [hereinafter MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS]. The Commission proposed the following plan – essentially the plan Anson Mills originally proposed to the U.S. Secretary of State in 1888 – to regulate the water of the Rio Grande and resolve Mexico's claim:

> (1) That the United States cede to Mexico the small tract of land before referred to [to allow Mexico to own one end of the dam and have access to the lake for the purpose of conducting its share of the waters impounded through its own territory], but reserving corporate rights of the Southern Pacific Railway Company to the United States.
>
> (2) Construct the dam [at El Paso] as designed by the joint engineers.
>
> (3) Remove the railroads from the bed of the proposed reservoir.
>
> (4) Acquire the land to be submerged.
>
> (5) And in some way prevent the construction of any large reservoirs in the Rio Grande in the Territory of New Mexico, or in lieu thereof, if that be impracticable, restrain any such reservoirs hereafter constructed from the use of any waters to which the citizens of the El Paso Valley, either in Mexico or the

> United States, have right by prior appropriation, and provide some legal and practicable remedy and redress, in case such waters should be used, to the citizens of both countries.

Id. at 41. The proposal further provided that the reservoir and dam would be jointly owned by the two countries and, in exchange for "Mexico relinquish[ing] all claims for indemnity for the unlawful use of waters in the past, and accept the dam so constructed as an equitable distribution, past and future, of the waters of said river," the United States would fund the entire project. *Id.*

Once the International Boundary Commission released its report in November 1896, recommending the construction of an international reservoir and dam at El Paso, the Mexican government supported the idea and entered into negotiations with the United States for a convention between the two countries which would conform to the specific recommendations of the International Boundary Commission. *See, e.g.*, Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Dec. 29, 1896), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 178; Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Jan. 4, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179; Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State

(Jan. 5, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179-81 (attaching draft convention); Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Jan. 30, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 181-84 (attaching subsequent draft convention); Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Mar. 3, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 184.

5. A competing plan for a privately funded reservoir and dam on the Rio Grande interferes with the negotiation of a convention between the United States and Mexico

But a wrinkle existed that interfered with the negotiations between the United States and Mexico: Anson Mills' proposal for a federally funded, international reservoir and dam was not the only irrigation proposal circulating during the 1880s. Interstate disputes between residents of the State of Texas and then-territory New Mexico over use of Rio Grande waters also festered, complicated by the uncertainty of local, territorial, and state authority over water rights. And so private equity, specifically the Rio Grande Dam and Irrigation Company, appeared and sought to build a reservoir and dam in New Mexico at Elephant Butte,

the site that was brushed aside earlier by Mills, who favored building a dam and reservoir at El Paso.

As recounted in 1901 by Nathan E. Boyd, Director-General of the Rio Grande Dam and Irrigation Company:

> From time to time during the past twenty years and more[,] various means of raising capital for the construction of a great storage dam to impound the flood waters of the river have been proposed by citizens of the Territory [of New Mexico]. Government aid has again and again been sought and investment of private capital solicited, but without avail. At one time the Federal Government appeared seriously to entertain plans, recommended by the Irrigation Bureau, for the construction of a series of storage dams. Reservoir sites on the Rio Grande were surveyed by Government engineers, who reported favorably on the proposition, and these sites were duly reserved, but nothing came of it, and ultimately they were thrown open for public appropriation (act of 1891) for reservoir purposes.
>
> In 1893 the Rio Grande Dam and Irrigation Company was incorporated under the laws of New Mexico. All the requirements of the Territorial and Federal statutes were complied with in order to legally establish the reservoir rights essential to the company's undertaking. . . .

[After an English company was formed, taking advantage of England's laws holding directors of a company personally liable and soothing anxieties of investors who mistrusted American industrial securities] to issue 8 per cent preference shares and 5 per cent debenture bonds (the former at par, the latter at a premium of 5 per cent), to be secured by a lease of the American company's undertaking, . . . [w]ork on the proposed dams and canals was begun [at the Elephant Butte site]; a great colonization system was organized; branch offices and agencies were established in Great Britain and on the Continent, and the company's literature, descriptive of the climatic and other advantages offered to settlers in the valley and of the resources of the Territory, was printed in English and French and widely circulated; contracts for the sale of large blocks of land for fruit and vine culture were made, the company undertaking to provide water within two years; agreements were entered into with the owners of the community ditches in the valley whereunder the American company would concede water rights to the landowners along such ditches in exchange for the community ditches and for blocks of land, the farmers to pay an annual water rent of $1.50 per acre for every acre irrigated. In fact, everything conducive to the colonization and development of the valley which good management could suggest and capital secure was provided for.

Letter from Nathan E. Boyd, Dir.-Gen., Rio Grande Dam & Irrigation Company, to Honorable Members of the United States Senate (Jan. 10, 1901), *in* S. COMM. ON FOREIGN RELATIONS, HISTORY OF THE RIO GRANDE DAM AND IRRIGATION COMPANY, S. DOC. NO. 56-104, at 3-4 (1901) [hereinafter 1901 Boyd Testimony].

Formed in 1893, the activities and proposed diversions of the Rio Grande by the Rio Grande Dam and Irrigation Company immediately drew the ire of downstream inhabitants. In 1896, citizens of Mexico urged their government to intercede on their behalf to insist that the United States suspend all work of the Rio Grande Dam and Irrigation Company in its construction of a reservoir and dam at Elephant Butte. *See, e.g.*, Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Aug. 4, 1896), *in* MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, S. DOC. NO. 55-229, at 2-3 (1898) (attaching translation of a June 22, 1896, letter from a representative of Mexican citizens to the Mexican Secretary of Foreign Relations).

Although by 1897, the United States and Mexico had embraced the recommendations of the International Boundary Commission and had entered negotiations regarding the international, U.S.-funded reservoir and dam at El Paso, the United States had a problem: What to do about the water rights and rights of way provisionally given by the U.S. Secretary of the Interior (and the application for water rights submitted to Territory of New Mexico) for the Rio Grande

Dam and Irrigation Company to construct the Elephant Butte reservoir and dam? As explained to the Mexican Foreign Minister by the U.S. Secretary of State:

> I must add, however, that in preparing to enter into negotiations the Department has found the subject embarrassed by greatly perplexing complications arising out of reservoir dams, etc., either already built or authorized through the concurrent action of the Federal and State authorities. Just what legal validity is to be imputed to such grants of authority, or in what way structures completed or begun are to be dealt with, are questions under careful investigation and which must be disposed of before the United States will be in a condition to negotiate.

Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Jan. 4, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179. Practically speaking, it was clear that two reservoirs and dams on the Rio Grande within close proximity were hopelessly incompatible projects: "First, if the Rio Grande Company built the proposed dam at Elephant Butte, a reliable water supply would not exist for the proposed international dam at El Paso[;] [s]econd, the proposed international dam would flood a substantial portion of the irrigated land in the Mesilla Valley [in New Mexico]."

William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENV. WATER L. REV. 1, 11 (2001).[16]

The U.S. State Department coordinated with the Departments of War and Justice to assess those issues. Secretary of State Olney wrote to the Secretary of War to ascertain whether he characterized the Rio Grande as a "navigable water," in which case, pursuant to applicable law, the Rio Grande Dam and Irrigation

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[16] In November 1896, when the International Boundary Commission released its recommendations for an internationally funded dam and reservoir at El Paso, Anson Mills saw that the privately funded dam at Elephant Butte would interfere with the Commission's proposal. He made a request to Secretary of State Richard Olney

> that if practicable the approval of the reservoir of the Rio Grande Land and Irrigation Company, Limited, at Elephant Butte be canceled or withdrawn, and, if not practicable to cancel or withdraw the same, that such executive or legislative restriction be placed upon it as to prohibit it from using any part of the flow of the river to which the inhabitants of either bank of the river below may have a prior right by appropriation, and that some prompt and efficient remedy be provided the possessors of these prior rights by appropriation in case the company should use any water to which the inhabitants referred are entitled.

Letter from Anson Mills, Col., Third Cavalry, U.S. Army, to Richard Olney, U.S. Sec'y of State (Nov. 17, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 13 (1898).

Company would have been required to obtain the permission from the Secretary of War as "a necessary prerequisite to the lawful erection of the dam." *See* Letter from Richard Olney, U.S. Sec'y of State, to Daniel S. Lamont, U.S. Sec'y of War (Jan. 13, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 25. The Secretary of State reminded the Secretary of War that

> [s]ection 10 of the act of September 19, 1890, is a general provision enforcible in the courts under the direction of the Attorney-General of the United States, and his aid would necessarily be invoked by you should you determine to put this provision of law in force against the Rio Grande Dam and Irrigation Company's obstruction of the river at Elephant Buttes [sic].

Id. at 26. After finding that the Rio Grande was indeed navigable,[17] and, therefore, the building of a dam at

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[17] The War Department received advice regarding "the navigability of the Rio Grande River as affecting the validity of the claim to the right to dam the river at Elephant Butte, made by the Rio Grande Dam and Irrigation Company" from an engineer who served on the International Boundary Commission:

> The periods of high water recur annually with regularity, and at such times the river is unquestionably navigable at and above El Paso, and could certainly be used in commerce for floating logs and flatboats. I have no knowledge of the fact that this portion of the river has ever been put to such use, the country being but sparsely settled and timber being exceedingly scarce. But the issue is not whether the river has been actually navigated, but whether it is navigable within the meaning of the law, so that it can be classified as

Elephant Butte required the approval of the War Department, the Secretary of War requested advice from the U.S. Attorney General's Office as to how to proceed, which concluded:

> (1) That the Secretary of the Interior had no power, under the provisions of the act of March 3, 1891 . . . to grant the rights claimed.
>
> (2) That the remedy of the United States is by injunction under section 10 of the act of

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navigable waters of the United States entitled to the protection of the Secretary of War under the act of September 19, 1890.

As many rivers of the country have been so classified which in point of depth, volume, and regularity of flow offer fewer advantages to navigation than does the Rio Grande at El Paso, it seems clear to me that this stream should also be so classified.

Further, it would appear from the inclosed [sic] papers that it has heretofore been decided that the Rio Grande is navigable at and below a point 150 miles below El Paso, and since the river receives no important tributary within this 150 miles of its course, it is manifest that a dam at Elephant Butte which would entirely stop the flow at El Paso would necessarily injuriously "modify the capacity of the channel" of the river in that part of its course where it has heretofore been held to be navigable.

From either of these standpoints it would appear that the plans of the Rio Grande Dam and Irrigation Company require the approval and authorization of the Secretary of War.

Letter from G.M. Derby, Capt. U.S. Army Corps of Engineers, to W.P. Craighill, Brig. Gen., U.S. Army Corps of Engineers (Feb. 1, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 185-86.

> September 19, 1890 . . . and if the dam has been constructed, also by criminal prosecution.
>
> Upon being advised that the obstruction has been or is about to be erected, I shall at once order proper proceedings to be instituted by the United States district attorney. . . .

Letter from Holmes Conrad, Solicitor-General, to Russell A. Alger, Sec'y of War (Apr. 24, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 189-90.

The United States intervened in 1897 to halt construction of the Rio Grande Dam and Irrigation Company's construction of the dam and reservoir at Elephant Butte. The legal challenges by the United States were predicated upon the theory that the "Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity; and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of congress." *United States v. Rio Grande Dam & Irrigation Co.*, 9 N.M. 292, 295 (1898). The litigation lasted years. *See, e.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 710 (1899) (reversing the holding of the New Mexico high court, remanding, and ordering "an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability"); *United*

States v. Rio Grande Dam & Irrigation Co., 184 U.S. 416, 424 (1902) (reversing the holding of the New Mexico high court and remanding "with direction to grant leave to both sides to adduce further evidence," as "it is quite clear that the record does not contain evidence of a material character" and "the questions presented may involve rights secured by treaties concluded between this country and the Republic of Mexico").

In the end, Nathan Boyd and the Rio Grande Dam and Irrigation Company won battles, but lost the war. In April 1903, the United States filed a supplemental complaint against the Rio Grande Dam and Irrigation Company, alleging that its right to construct the dam and reservoir had expired, as the 1891 General Revision Act required reservoir projects to be at least partially constructed, if not completed, within five years of obtaining the right. *See United States v. Rio Grande Dam & Irrigation Co.*, 13 N.M. 386, 395 (1906). In 1909, the Supreme Court affirmed the lower court's ruling that the Rio Grande Dam and Irrigation Company's right had expired for non-use; thus ended the privately funded dam and reservoir project. *See Rio Grande Dam & Irrigation Co. v. United States*, 215 U.S. 266, 277-78 (1909).

Although it appeared that the litigation to stop the privately funded dam and reservoir at Elephant Butte would clear the path for the international convention with Mexico to resolve its claim for damages, the U.S. Attorney General's intervention did not proceed unnoticed by citizens of New Mexico. *See, e.g.*, Letter from Frank Burke to President William McKinley (Aug. 7,

1897), *in* MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, S. DOC. NO. 55-229, at 195-96 ("Your Attorney-General stopped us from building our dam on the grounds that we would obstruct navigation, yet the Mexican people have their dam in [El Paso]. . . . I am a lifelong Republican, and I am sure we feel the Attorney acts in our party in southern New Mexico. We fail to see where the protection comes in, as it is only helping old Mexico."). And the protracted litigation did not go smoothly for the United States. The United States would not prevail in the litigation against the Rio Grande Dam and Irrigation Company until 1909, leaving Mexico's claim for damages an open wound for years.

C. Legislative Attempts Toward Solving the Problems Regarding Reclamation of the Western Arid States, Including the Equitable Distribution of the Waters of the Rio Grande

1. The debate between cession versus a comprehensive federal scheme for reclamation of western arid lands leads to the 1902 Reclamation Act and the creation of the Reclamation Service

Throughout the late 1880s and early 1890s, Congress received scores of petitions from individuals and legislatures of western states to fund reclamation projects; all petitions were referred to the Select Committee on Irrigation and Reclamation of Arid Lands. *See,*

e.g., 21 CONG. REC. 142 (1889) (presenting "a communication from the acting secretary of the Territory of Arizona, inclosing a memorial of the fifteenth Legislative Assembly of the Territory of Arizona, relating to the construction of a storage reservoir for the reclamation of arid land"); 21 CONG REC. 353 (1889) (presenting "a memorial of 180 farmers, residents of Edmunds County, South Dakota, showing that the rainfall in that locality is insufficient for successful farming, and praying for such assistance from the Government as may be consistently rendered to obtain water for the purposes of irrigation"); 21 CONG. REC. 383 (1890) (presenting "a petition of the fruit-growers of California, praying for the irrigation of arid lands"); 21 CONG REC. 9777 (1890) (presenting "the petition of J.H. Hanna and 69 other citizens of Chase County, Nebraska, praying that an appropriation be made in aid of irrigation"); 22 CONG. REC. 2373 (1891) (presenting "the petition of the Legislature of the State of Kansas, praying for the adoption of a system of irrigation and the appropriation of the sum of money necessary therefor").

In 1894, Congress enacted the Carey Act, named for Senator Joseph M. Carey of Wyoming. *See* Act of Aug. 18, 1894, ch. 301, § 4, 28 Stat. 422 (codified as amended at 43 U.S.C. §§ 641-648). Representative Francis Griffith Newlands of Nevada summarized the climate existing prior to the Carey Act's passage as he argued in favor of the Act:

> [T]he arid-land question has been agitated for a great many years, not only in the western regions of our country, but in the

Halls of Congress. Conventions have been held throughout the West upon this important subject, and the unanimous sentiment is now, after long discussion, that the question of the reclamation of these arid lands can be settled alone by the respective States. They have come to that conclusion, though they desired in the first place that the Government of the United States should undertake the work of reclamation and should then open the reclaimed lands to settlement.

The Government of the United States has been unwilling to do that, for the reason that it involved the selection of vast areas of land, the erection of irrigation works, reservoirs, distributing canals, etc., and the expenditure of a sum ranging from $10 to $50 per acre in the work of reclamation. The National Government is unwilling to undertake the work, though the States in the arid region desired it to do so, and through it ought to do so.

Various measures have been introduced in Congress with reference to the granting of these arid lands to the various States. Measures looking to this end have repeatedly passed one House and failed of consideration in the other. Committees have passed upon the question in various forms. I think I am safe in saying that it is almost the unanimous sentiment of the various irrigation committees of this Congress and of past Congresses that grants of these lands should be made to

> the States, and that they should undertake the work of reclamation.

26 CONG. REC. 8427 (1894).

The Carey Act attempted to encourage settlement of public lands in western states that required irrigation for productive farming by allowing the federal government through the General Land Office to transfer up to one million acres of public lands to individual western States that established federally approved reclamation programs. 28 Stat. at 422.[18] The States themselves would not necessarily be required to fund or establish reclamation projects; rather, the States could contract with private companies to finance the projects and profit from selling the water at rates regulated and fixed by the State. *Id.* Once the State or private company recouped its investment plus a set profit, "any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, [would] be held as a trust fund for and be applied to the reclamation of other desert lands in such State." *Id.* at 423. Construction and settlement of the reclamation projects had to be completed within ten years. *Id.* at 422. The States were responsible not only for identifying the land, but also for soliciting farmers and settlers according to established criteria, usually including paying fee for the land and promising to cultivate a certain percentage of the land; but "said States shall not sell or dispose of more than one hundred and

[18] Notably, territories such as Arizona and New Mexico were excluded from the Carey Act.

sixty acres of said lands to any one person." *Id.* at 422-23. If settlers complied with cultivating at least twenty acres of the 160 acres granted to them, they could ultimately obtain the deed to those acres. *Id.* at 422.

Although some states achieved successes under the Carey Act, historians consider the Act a dismal failure for the most part:

> [The Carey Act] was designed to serve the needs of those states whose largest streams still carried plenty of unclaimed water, such as Wyoming, Montana, and Idaho. The law contained nothing that would encourage private companies to build expensive *storage* projects, and it assumed a very low per-acre cost for water. . . .
>
> . . . .
>
> Oddly, the most obvious question about the Carey Act – how it could manage to lure farmers west in the midst of a depression – was never asked. . . .
>
> . . . .
>
> The Carey Act companies quickly ran out of money; the expected wave of new farmers never materialized; and those who came had too little capital to carry them through the lean months and years before their farms began to pay. Moreover, the projects were far removed from rail lines and major markets. Worst of all, the 1894 law did not provide adequate protection against speculators. The

> Carey Act could work only if the land to be reclaimed was segregated and reserved *immediately*. The first applications for Carey Act land sent to the General Land Office received no response for months. . . .

PISANI, TO RECLAIM A DIVIDED WEST, at 252-54, 260; *see also* John E. Thorson, Ramsey Laursoo Kropf, Dar Crammond & Andrea K. Gerlak, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 382-83 (2005).

Amid conflicts between agricultural and grazing interests in the western States,[19] as well as between western States' desires to develop agriculture within their borders and eastern States' desires to protect their own economies,[20] a debate emerged between cession and an overarching federal scheme as the best

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[19] *See generally* PISANI, TO RECLAIM A DIVIDED WEST, at 225-72, 294-98.

[20] Annual appropriations granted under the Rivers and Harbors Act became a battle ground between eastern and western States. Historically, the federal government had funded improvements to river channels and harbors; by 1886, annual appropriations had become considerable. *See* Act of Aug. 5, 1886, ch. 929, 24 Stat. 310 (appropriating over $100 million "for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes"). Indeed, the annual appropriations made via the Rivers and Harbors Act were viewed as a cash cow for states across the nation. As described by Senator Francis Warren of Wyoming:

> I maintain that the river and harbor bill may be dumped into the wastebasket this morning and the country go on just the same. There is not a single dollar in all the twenty-eight or thirty million dollars carried in the bill, exclusive of the Nicaragua Canal and nearly

> one hundred and fifty million including it, that we cannot get along without expending.
>
> Nobody is subsisting on it; nobody's distress is relieved by it. What is it, then? It is simply a dividend declared by this nation and distributed over it for the benefit of trade and commerce. That is all there is of it, and there need be no concealment. If it was truly a river and harbor bill, Simon pure, to improve some river or harbor most necessary for ships to go in and out through, we would not find 15 or 16 rivers and creeks that we had never heard of before and we [cannot] find on any official map generously provided for with appropriations in this bill. Not at all.

32 CONG. REC. 2278 (1889); *see also* 34 CONG. REC. 3552 (1901) ("For many years I have witnessed the growth of this bill. The country has witnessed it. There need be no mistake about that. This river and harbor bill is known to people in the backwoods counties of every State in the Union as 'the pork bill.' Men who have never seen a harbor know that there is something wrong about the way this bill is put together.") (statements of Sen. Thomas H. Carter of Montana).

In 1899, senators from Montana and Wyoming offered amendments to the Rivers and Harbors bill for the purpose of constructing reclamation projects in those States, but the bill was opposed by many senators from eastern States, worried that western States would compete unfairly with eastern U.S. farmers:

> I do not look grudgingly at the development of the West or its resources, mineral and agricultural as well, but I only called attention to the fact that [the proposed amendments] would impose an unequal burden of taxation to develop the agricultural resources of any part of this country at the expense of another, and that the exercise of which I conceive to be an unconstitutional power would result in just that thing and justify the wisdom of those who made the great charter of our Government in withholding from the Government the power to thus discriminate.
>
> I welcome every advance made by the part of the country, teeming with great resources, from which the

way to reclaim western arid lands. Cessionists advocated for public or surplus lands to be transferred by the federal government to individual States in order for those States, or private enterprise, to construct and operate reclamation projects under state law. *See, e.g.*, 30 CONG. REC. 853 (1897) (introducing and debating S. 372 that would cede all public lands to the

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> Senator comes and which he so ably represents. Every addition that it makes to its own prosperity is an addition to the common weal. I know that. I do not envy him or grudge him his silver and his gold and his golden fleeces.
>
> . . . .
>
> I do not grudge him, but all I want is that he shall be content with the bountiful gifts of Providence that have been with such a lavish hand distributed to that glorious country, and not seek to take a tail of taxation from the poor farmers east of the Mississippi in order to increase what has already so bountifully been supplied.

32 CONG. REC. 2278 (1889) (statements of Sen. George Gray of Delaware). Senator Warren countered by arguing that western States, in fact, had been subsidizing eastern States annually through the Rivers and Harbors Act appropriations, as evidenced by the fact that, in the proposed bill, "for the subdivisions of the United States there are more than $30,000,000 appropriated by the bill," and "of the nineteen or twenty-two political divisions covering the western half of the country, there is a paltry and measly sum of $2,000,000 only." *Id.* The proposed 1899 amendments appropriating funds to western States did not pass, even after a valiant effort by Senator Warren to block the entire Rivers and Harbors Act by filibuster. But when western States proposed similar amendments to the 1901 Rivers and Harbors bill, which were again rejected by eastern interests, Senator Carter of Montana filibustered successfully, defeating the entire 1901 bill, ensuring that no state received appropriations that year under the Rivers and Harbors Act. *See* 34 CONG. REC. 3519-62.

states for purposes including education and irrigation). Cession would ensure state control over water. As pressed in 1897 by Senator John Tyler Morgan of Alabama:

> There is another question that would follow along with this, which is about to produce a good deal of legislation here, perhaps some of it a little wild, some of it a slight strain upon the constitutional authority of Congress, and that is the subject of irrigation. If you will give all these public lands to the different States, they will undertake systems of irrigation and carry them out in such a way as will enable them to develop untold thousands and millions of acres of land that are now fertile lands, but entirely unproductive for the want of water. That great question would be removed from [federal] jurisdiction and left in the hands of the States and Territories, where the ultimate purpose of all the revenues to be derived from the sale of public lands in the States and Territories is for education. Of course, *the incidental power of disposal would follow the grant*. The grant, as I propose to make it in this amendment, is a grant without condition. It merely indicates the purpose for which the grant is made, and that purpose is not a condition subsequent, upon which the grant would be declared void in the event that it was not executed.

Id. at 854 (emphasis added). On the other hand, "[t]he states that supported federal reclamation did so for very different reasons." PISANI, RECLAIM A DIVIDED

WEST, at 267. "For example, Arizona resented the fact that the territories were not included in the Carey legislation, and Kansas did so in part because it feared Colorado's control over the interstate streams the two states shared." *Id.*

But by 1900, faced with the lack of success of endeavors such as the Carey Act, the members of the Ninth National Irrigation Congress[21] passed a resolution advocating for a national reclamation scheme:

> We hail with satisfaction the fact that both of the great political parties of the nation in their platforms in the last campaign declared in favor of the reclamation of Arid America,[22] in order that settlers might build

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[21] The National Irrigation Congress

> had evolved into one of the most important forces behind federal involvement in reclamation in the western states. The delegates to these conferences included prominent state and national politicians, irrigation engineers, educators in the field of agriculture, members of commercial organizations, officials of private water companies, and other leaders of public opinion. . . .

LITTLEFIELD, *supra* note 11, at 105 (citations omitted).

[22] Representative Francis Newlands recounted before the House of Representatives in 1902:

> For years the arid States have been insisting upon some action by the Federal Government in reference to the arid public lands, composing as they do in some States 95 per cent of their entire area, and they have been insisting that it is the duty of the Government to prepare these lands for settlement, so that the States in which they are located may become populated.

homes on the public domain, and to that end we urge upon congress that national appropriations commensurate with the magnitude of the problem should be made for the preservation of the forests and the reforestation of denuded areas as national storage reservoirs and for the construction by the national government, as part of its policy of internal improvements, of storage reservoirs and other works for flood protection, and to save for use in aid of navigation and irrigation the waters which now run to waste, and for the development of artesian and subterranean sources of water supply.

They urged for a long time the cession of these lands to the States. But Congress, regarding this great public domain as a public trust, not to be lightly turned over to sparsely settled States to be managed according to the judgment or lack of judgment, the discretion or indiscretion, the honesty or dishonesty, the providence or improvidence, of State legislatures, regarding it as a heritage for the entire Union, to be preserved for our unborn millions, has refused in its wisdom a cession to the States. So, at last, after the subject had been debated in and out of Congress for twenty years or more, the two parties in 1896 met in their respective conventions and formulated their expression on this subject, almost identical in terms – certainly identical in spirit.

Both parties declared in favor of the reclamation of these arid lands by the National Government and the holding of such lands for actual settlers, and in so declaring they but followed the general sentiment of the country, which was against any abandonment of its trust by the National Government and its surrender to the States.

35 CONG. REC. 6673 (1902).

> The water of all streams should forever remain subject to public control, and the right to use of water for irrigation should inhere in the land irrigated and beneficial use be the basis, the measure and the limit of the right.
>
> The work of building the reservoirs necessary to store the floods should be done directly by the government under existing statutes relating to the employment of labor and hours of work, and under laws that will give to all American citizens fair and equal opportunity to get first employment and then a home on the land.
>
> We commend the efficient work of the various bureaus of the national Government in the investigation of the physical and legal problems and other conditions relating to irrigation, and in promoting the adoption of more effective laws, customs and methods of irrigated agriculture and urge upon congress the necessity of providing liberal appropriations for this important work.

PROCEEDINGS OF THE NINTH ANNUAL SESSION OF THE NATIONAL IRRIGATION CONGRESS, HELD AT CENTRAL MUSIC HALL, CHICAGO, ILL., Nov. 21-24 at 270-71 (1900), http://babel.hathitrust.org/cgi/pt?id=uc1.b2936543;view=1up;seq=7 (last visited Jan. 6, 2017).

In the first quarter of 1901, Representative Francis Newlands and others introduced competing and amended bills aimed at establishing a national reclamation scheme. *See, e.g.*, H.R. 13846, 56th Cong. (1901); H.R. 14088, 56th Cong. (1901); H.R. 14192, 56th Cong.

(1901); H.R. 14203, 56th Cong. (1901); H.R. 14250, 56th Cong. (1901); H.R. 14326, 56th Cong. (1901).[23] The highlights of the last bill introduced by Representative Newlands on March 1, 1901, provided that: (i) a reclamation fund would be created through the sale of the federal public lands in western States and would be dedicated to reclamation projects in those states (but not necessarily in the State from which the sales derived), *see* H.R. 14338, § 1, 56th Cong. (1901); (ii) "the Secretary of the Interior may, in his discretion, withdraw from public entry the lands required for reservoir or other irrigation works," *see id.* § 3; (iii) the federal government would construct and perpetually operate and maintain all reservoirs constructed pursuant to the act, but the irrigation works apart from the reservoirs would "pass as an appurtenance to the lands irrigated thereunder, to be maintained and operated by the owners of such lands at their own expense" once the federal government had been paid for the construction of those works, *id.* § 8; (iv) the Secretary of the Interior would be responsible to dispose of the lands pursuant to the Homestead Act, *see id.* § 5; and (v) the costs of the construction and maintenance of irrigation works would be borne by the entryman over a period

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[23] Alternatively, Representative Newlands and others also introduced bills proposing discrete reclamation projects or surveys. *See, e.g.*, H.R. 13847, 56th Cong. (1901) (bill introduced by Rep. Frank Wheeler Mondell of Wyoming proposing survey and report by Geological Survey of possibilities and cost of comprehensive water storage in arid western states and territories); H.R. 14072, 56th Cong. (1901) (bill introduced by Rep. Newlands proposing appropriations for specific reclamation projects in seventeen western states and territories).

of ten years after completion of the works, with "the right to the use of the water shall be perpetually appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right," *id.* Regarding the relationship of the proposed national reclamation project to state water law, the bill provided

> [t]hat nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State relating to rights to water or its distribution for irrigation, and in the selection of locations for the construction of reservoirs or irrigation works under this Act, the Secretary of the Interior shall select localities where in his judgment the provisions of this Act can be carried into effect without any conflict or interference with the laws of any State relating to irrigation, *and the Secretary of the Interior may decline to let any contract for the construction of any proposed reservoir or irrigation works in any State until under the laws of such State the rights to the use of water from such reservoir or irrigation works in accordance with the provisions of this Act shall be assured under the laws of such State.*

Id. § 11 (emphasis added). Congress adjourned without a full debate on the bill.

In December 1901, President Theodore Roosevelt delivered his first annual message to Congress and appealed for coordinated national reclamation and irrigation, but included a somewhat mixed signal

regarding a federal reclamation scheme's relationship to state water law:

> There remain . . . vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation.
>
> . . . .
>
> Our aim should be not simply to reclaim the largest area of land and provide homes for the largest number of people, but to create for this new industry the best possible social and industrial conditions; and this requires that we not only understand the existing situation, but avail ourselves of the best experience of the time in the solution of its problems. A

> careful study should be made, both by the nation and the States, of the irrigation laws and conditions here and abroad. *Ultimately it will probably be necessary for the nation to co-operate with the several arid States in proportion as these States by their legislation and administration show themselves fit to receive it.*

Theodore Roosevelt, First Annual Message (Dec. 3, 1901), *in* STATE PAPERS AS GOVERNOR AND PRESIDENT 106, 108-09 (1925) (emphasis added).

Shortly after President Roosevelt's December 1901 address, "the Senators and Representatives from 13 States and 3 Territories, constituting the arid region, met together and appointed a committee of 17, regardless of party, to frame and present for their approval an irrigation measure." 35 CONG. REC. 6674 (1902) (statement of Rep. Newlands). Representative Newlands and Senator Henry C. Hansbrough of North Dakota simultaneously introduced a reclamation bill, modified in accordance with the President's remarks, in the House and Senate on January 21, 1902. *See* H.R. 9676, 57th Cong. (1902); S. 3057, 57th Cong. (1902).

The modifications contained in the reclamation bill introduced in January 1902, included an increase in the maximum amount of acreage available for purchase under the Act to 160 acres. *See* H.R. 9676, §§ 3, 5; S. 3057, §§ 3, 5. Other modifications included a provision that would pass "the management and operation of, but not the title to . . . irrigation works, excepting reservoirs and the works necessary for their

protection and operation" to the owners of the land irrigated thereby once repayment had been made to the federal government for construction of those works. H.R. 9676, § 6; S. 3057, § 6. Regarding the proposed federal reclamation scheme's relationship with state water law, the modified 1902 reclamation bill contained much stronger federal deference to state water law:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this Act*: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

H.R. 9676, § 8 (emphasis added); S. 3057, § 8 (emphasis added).

As the 1902 reclamation bill wound its way through the legislative process, it sustained several minor amendments.[24] In early April 1902, President

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[24] For example, in February 1902, legislators added the requirement that entrymen irrigate "*at least one-half of the total area of his entry* for agricultural purposes." S. 3057, § 5 (ordered reprinted as agreed to in the Committee of the Whole, February 28, 1902).

Roosevelt met with various congressmen and advisors on the terms of the reclamation bill, including the wording of Section 8 of the bill and to what extent state water law should govern the appropriation, distribution, and use of water stored through federal reclamation projects under the proposed Act; as a result of that meeting, the phrase "but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this Act" was stricken and replaced with new language, so that the text of Section 8 of the proposed bill read:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof*; *Provided*, That the right to the use of the water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

S. 3057, 57th Cong., § 8 (Reported with amendments, committed to the Committee of the Whole House on the state of the Union, April 7, 1902); *see also, e.g.*, Letter from J.A. Breckons to Sen. F.E. Warren (Apr. 3, 1902), Francis E. Warren Papers, Box 5, Folder 3, Am. Heritage Ctr., Univ. of Wyoming ("The conference was requested by [Rep. Frank W.] Mondell [of Wyoming], and at his suggestion the President invited [George] Maxwell and [Gifford] Pinchot to attend, inasmuch as they had been the strongest opponents here of the state control section of the irrigation bill. . . . [The President] then took up the irrigation bill, saying that he trusted the House Irrigation Committee would modify the state control section so that the measure could have the support of those who favored the general idea of irrigation, but were opposed to absolute state control. He intimated that he would favor such a bill, even though it should not meet the views and receive the indorsement [sic] of extremists.") (**DVD Doc. 1**). (With this report I have provided a DVD with historical material I examined and cited herein, and listed and described in the Index.) As reported in one magazine:

> The so-called state-control clause was modified by striking out the later portion of the section and making a substitution therefor, so that as the clause now stands it provides that nothing in the bill shall interfere with any state law relative to the appropriation, distribution, or use of water, and the Secretary of the Interior in carrying out the provisions of the act shall proceed in conformity with state laws; also that nothing in the

> bill shall be held to affect the rights of any state or states, or of the federal government, or of any individual in the waters of any interstate stream. The last provision simply leaves in operation the present rule of priority on the arid region.
>
> The members of the Irrigation Committee feel sure that the bill as reported will be satisfactory to all irrigation interests. The last clause of the state-control provision is inserted with the idea of fully meeting the views of all those living in states along the lower course of streams used for irrigation purposes.

News and Notes, *The Irrigation Bill*, FORESTRY AND IRRIGATION, Apr. 1902, at 141, https://books.google.com/books?id=ImwmAQAAMAAJ&pg=PA141&lpg=PA141&dq=Forestry+and+Irrigation+April+1902&source=bl&ots=d1MsmPlkkD&sig (last visited Jan. 6, 2017).[25]

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[25] On April 15, 1902, Benjamin Ide Wheeler, President of the University of California, and member of a state commission charged with drafting laws and rules for state water boards in California, wrote to President Roosevelt with his views on Section 8 of the proposed reclamation bill:

> I noticed some days ago an item in the newspapers which indicated your justifiable suspicion regarding the bearings of Section 8 of the Bill, – the section which, among other things, provides that "state and territorial laws shall govern and control in the appropriation," etc., "of the waters rendered available." I do not know precisely the range of your objection, but I can surmise that you think the section either goes too far or not far enough. This, I think, is true; but still the section, even as it stands, is, I believe, essential to the success of the measures proposed. Either the Federal Government

> must assume the entire charge of not only the storage, but the division and distribution of waters, and create anew the principles and methods and mechanism for such distribution, or it must require the States to pass laws providing for the administration of water supplies by State authorities, as is now done in Colorado, Wyoming, and Nebraska, and to some extent in Utah, Idaho, and Arizona; and it must furthermore insist upon action in the different States calculated to determine who now hold water rights and what their nature is. That the Federal Government should undertake the whole business is, I suppose, entirely out of the question. I think it would not be acceptable to the people of the West. I think also it would be too radical a measure altogether. What then remains, therefore, seems to me is for the Federal Government to commit the distribution, the use, etc., of the waters to the charge of State tribunals and laws, insisting that it will deal with only such as have established regular Commissions or Boards of Control which have determined what rights exist and are prepared to administer under those rights.

Letter from Benjamin Ide Wheeler, President, Univ. of Cal. to President Theodore Roosevelt 1-2 (Apr. 15, 1902), Theodore Roosevelt Papers, Library of Congress Manuscript Div., Theodore Roosevelt Digital Library, Dickinson State Univ., http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o37568. President Wheeler continued:

> The majority of the reservoirs to be built under the Act referred to will be located in the channels of running streams from which many ditches now divert water for irrigation. In some cases the water from the public reservoir can be best used for existing ditches, in others new ditches may be built, and in all cases the stored water will have to be turned in with the natural flow, and some authority will have to regulate the headgates of the ditches already built so as to prevent them from taking a part of the stored water, to which they are not entitled, – in other words, to insure that the

Another amendment to the bill occurring after the meeting with the President included the requirement that the Secretary of the Interior, when practicable, "*expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the arid and semiarid lands within the limits of such State or Territory*," as well as the requirement that the sale of water pursuant to the Act be made only to "*actual bona fide resident[s] on*

> purchasers of water rights in the Government reservoir get what they have paid for. There is not a stream in California of any consequence for the case in hand where the distribution of stored water will not create conflicts with present holders of rights established under the State laws. If, therefore, the Federal Government should undertake to administer the distribution of the water it stores, it would come into inextricable conflict with the States. It is evidently impossible to divide the water of one and the same stream between Federal administration and State administration without enormously intensifying the present chaos regarding water rights. I should like, therefore, if Section 8 is amended to see it amended so as to insist upon State Boards of Control and determination of existing facts and rights in such States as expect to share the advantages offered by the Government.

Id. at 2.

President Roosevelt quickly responded to Wheeler: "I thank you cordially . . . for the very favorable information you give me about irrigation. . . . I believe you are right. . . ." Letter from President Theodore Roosevelt to Benjamin Ide Wheeler (Apr. 21, 1902), Theodore Roosevelt Papers, Library of Congress Manuscript Div., Theodore Roosevelt Digital Library, Dickinson State Univ., http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o182020.

such land, or occupant[s] thereof residing in the neighborhood of said land." S. 3057, §§ 5, 9 (Reported with amendments, committed to the Committee of the Whole House on the state of the Union, Apr. 7, 1902). The revised bill also included the provision that the Secretary of the Interior withdraw from public entry *all* lands required for a particular project (not only those needed specifically for dams, reservoirs, and canals) and that he do so prior to the start of construction of those works. *Id.* § 3.[26]

In June 1902, Congress enacted into law the April 1902 bill as the Newlands Reclamation Act; in so doing, Congress established the Reclamation Service within the Department of the Interior ("Reclamation") to oversee the concerted federal effort to alleviate the economic depression, drought, and population concerns in western states and territories at that time by allowing the government to undertake irrigation projects to establish family farms to relieve urban congestion. *See* Act of June 17, 1902, ch. 1092, 32 Stat. 388 (codified as

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[26] As reported by one newspaper:

> Another matter for modification is the portion regarding the withdrawal of lands from entry. It is desired that the bill shall be so carefully worded as to give the benefit of irrigation to bona fide settlers and prevent any opportunity at speculation. The interests of settlers are to be guarded most carefully.

At the White House, Conference on the Subject of Irrigation Today, THE EVENING STAR (Washington, D.C.), Apr. 2, 1902, at 1, http://chroniclingamerica.loc.gov/lccn/sn83045462/1902-04-02/ed-1/seq-1/ (last visited Jan. 6, 2017).

amended at 43 U.S.C. §§ 371-600e) [hereinafter 1902 Reclamation Act]. The 1902 Reclamation Act required

> [t]hat all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming . . . [be] reserved, set aside, and appropriated . . . to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories. . . .

Id. § 1. The 1902 Reclamation Act also limited distribution of water from its federal projects to landholdings and farms 160 acres or smaller, in order to create and serve new small family farms and avoid the creation of federally subsidized large farms in the West that would unfairly compete with smaller established farms in the East. *See id.* § 5. As Ethan A. Hitchcock, Secretary of the Interior, explained in 1905:

> Owing to the lavish disposal of the public lands during recent years there remains in the possession of the Government only a comparatively small amount of land which ultimately may be irrigated, most of the reclaimable land being in the hands of individuals or corporations. One of the wisest provisions of the reclamation act is that which states that "no right to the use of water for land in private ownership shall be sold for a

> tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or an occupant thereof residing in the neighborhood." It is believed that judicious enforcement of this provision will bring about the cultivation of the reclaimed land in small holdings; thus indirectly many of the errors of the past in respect to profligate disposal of irrigable land may be partly remedied. It is obviously not the intent of the reclamation act to irrigate at public expense large private holdings and increase the wealth of a small number of men unless the public receives an equivalent gain. The strongest argument for the law is, not that it adds to the wealth of the State, but that it builds the greatest number of homes and creates a community of owners of the soil who live on the land and derive their sustenance from it.

ANN. RPT. OF THE SEC'Y OF THE INTERIOR 79-80 (1905), https://archive.org/stream/annualreportsof01unit#page/78/mode/2up (last visited Jan. 6, 2017). Reflecting in 1913 on the passage and implementation of the 1902 Reclamation Act, President Theodore Roosevelt stated:

> On June 17, 1902, the Reclamation Act was passed. It set aside the proceeds of the disposal of public lands for the purpose of reclaiming the waste areas of the arid West by irrigating lands otherwise worthless, and thus creating new homes upon the land. The money so appropriated was to be repaid to the

> Government by the settlers, and to be used again as a revolving fund continuously available for the work.
>
> The impatience of the Western people to see immediate results from the Reclamation Act was so great that red tape was disregarded, and the work was pushed forward at a rate previously unknown in Government affairs. . . .
>
> . . . .
>
> Every item of the whole great plan of Reclamation now in effect was undertaken between 1902 and 1906. By the spring of 1909 the work was an assured success, and the Government had become fully committed to its continuance.

THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 396-97 (1913).

2. Congress establishes the Rio Grande Project operated by Reclamation

Shortly after its inception, Reclamation examined the merits of the International Boundary Commission's 1896 proposal for a reservoir and dam at El Paso. Reclamation took issue with the Commission's proposal:

> While the published report of the Commission and its engineers plainly sets forth the fact that increased irrigation in Colorado caused shortage of water in Mexico, Texas,

and New Mexico, the recommendations not only leave New Mexico out of all the benefits to be derived from a project inaugurated for the purpose of making up this shortage, but give part of her territory to Mexico; cover up another part of it by the proposed reservoir, and distinctly ask that the Government shall prevent the construction of any other large reservoir on the Rio Grande in the Territory of New Mexico. The only reasonable explanation of these recommendations lies in the probable fact that the Commission had no alternative plan for consideration, and thought that the plan recommended was the only possible means that could be adopted for restoring the water to which Mexico laid claim by virtue of ancient prior use. Indeed they were confronted at the time with the prospect of an Elephant Butte dam in New Mexico, not under Government management, but to be constructed, owned, and operated by a stock company of private capitalists, whose plans contemplated the construction of a comparatively low dam without sufficient storage capacity for irrigating a large area above and leaving a surplus for Mexico. Now that conditions have completely changed, and there is an alternative plan which it is claimed will accomplish just as much for Mexico and a great deal more for the United States, it becomes necessary to compare these two plans and choose between them.

1903-04 THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE, at 397-98. In addition to citing the prohibitive costs of flooding "the many thousand acres of rich, high-priced, Mesilla Valley lands," and the required removal of railroad tracks occupying the land to be flooded, Reclamation noted that "[t]he El Paso reservoir would waste more water by evaporation and overflow each year than it would furnish for irrigation." *Id.* at 419. Further,

> [i]t would produce in the immediate vicinity of El Paso many thousands of acres of mud flats and marshes on land that would otherwise be exceedingly valuable for agricultural and other purposes. It would furnish no water for irrigating the great Mesilla Valley in New Mexico, a region as truly tributary to El Paso as El Paso Valley itself, although it would waste enough water by evaporation and overflow to irrigate 83,000 acres.

Id.

Considering several factors, Reclamation sought its own solution to cure the water deficits below El Paso:

> In considering these projects or any other plans of water storage on the Rio Grande it is well to keep in mind the following facts:
>
> (1) While the floods on the river are enormous, they do not come with any regularity, and the total flow in some years is less than one-tenth of the flow in other years.

> (2) Any reservoir constructed on the river will stop all the silt that comes down the river in suspension. Hence a small reservoir will accumulate as many acre-feet of mud per year as a large one until it is filled with mud.
>
> (3) All the water that comes down the river is needed for irrigation, and none should be wasted.
>
> These three conditions make it imperative that the reservoir should be as large and as deep as possible, and should have capacity for carrying a supply of water over from year to year to equalize the yearly inequalities, a surplus capacity for mud accumulations, and a surface for evaporation that is as small as possible in comparison with the quantity of water in storage.

Id. at 398. It identified a site at Engle, New Mexico, a short distance downstream from the site at Elephant Butte proposed earlier by the privately-owned Rio Grande Dam and Irrigation Company, which would allow Reclamation to take better advantage of the geography and expand the size of the dam and resulting reservoir. The Elephant Butte, as "a conical mountain peak rising abruptly from the river bank to a height of about 500 feet," provided the perfect geological structure at which "to build a dam that will form a reservoir 175 feet deep at its lower end and 40 miles long, with a storage capacity of 2,000,000 acre-feet, enough water to furnish 600,000 acre-feet per annum and irrigate 180,000 acres of land" in the following distributions: (i) 110,000 acres in New Mexico; (ii) 20,000 acres in

Texas above El Paso; and (iii) 50,000 acres in the El Paso valley below El Paso in Texas and Mexico. *Id.* at 398. As explained by Reclamation:

> [T]he Engle reservoir will waste no water by overflow and a minimum amount by evaporation, and at the same time will furnish enough water for irrigation to supply Mesilla Valley, give a flow to the old Mexican canal equal to that which was used from it years ago for irrigation, and have enough left over to allow Texas to participate in the benefits.
>
> The Engle dam has the final advantage of being in New Mexico and subject to the reclamation act.

Id. at 419.[27]

Frederick Haynes Newell, Reclamation's Chief Engineer, and Benjamin M. Hall, consulting engineer to Reclamation, presented their proposal to the Twelfth National Irrigation Congress at its meeting held in El Paso, Texas, in 1904. "Hall believed that support by the 1904 National Irrigation Congress for a dam at Elephant Butte and the Rio Grande Project would result in its formal authorization by the secretary of the interior, the passage of related federal legislation extending the Reclamation Act to the El Paso

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[27] Texas was not included in the original sixteen states and territories identified in the 1902 Reclamation Act, as it had earlier existed as a sovereign republic and possessed no U.S. federal lands to sell or underwrite the reclamation fund; therefore, Reclamation had no authority upon which to execute a reclamation project in the El Paso Valley.

Valley in Texas, and the ratification of a treaty with Mexico." LITTLEFIELD, *supra* note 11, at 105-06.

Reclamation's proposal for a federally funded dam and reservoir to be constructed at Engle/Elephant Butte was met with resounding approval. As conveyed by L. Bradford Prince, former New Mexico Governor and a delegate to the National Irrigation Congress:

> For a number of years there has existed a diversity of opinion – no, I rather may say a bitterness of action – between those living in the Rio Grande valley with regard to the irrigation improvements which seem necessary in order to utilize the water of that river. It was a three-cornered controversy – on the north, those living in the Territory of New Mexico; to the south and east of the river, those living in the State of Texas, and on the west of the river our brothers in the Republic of Mexico. Each had its own ideas, and each was sufficiently tenacious and sufficiently powerful to prevent action on the part of the other. Each, I am sorry to say, as time went by, became more and more antagonistic to the other, so that it seems as if harmony of action was almost among the impossibilities. But a miracle has come; that which seemed to be impossible is not only possible, but is an assured and accomplished fact. Harmony and unity of action have succeeded in the place where before was contention and bitterness. There have been frequent assurances during the course of the existence of this Congress, among all of those from all parts of the Rio

> Grande valley, north and central and south, and this has resulted in the adoption of a resolution which has been very aptly called "a most happy solution of a vexed question." This agreement was so perfect, that yesterday afternoon, at a meeting in this room, a resolution was adopted unanimously, by all who were present, asking that some course of action should prevail, and that the officers of the Reclamation Service should go on and do the great work which they had found it was possible to do. And since that time, in another conference, this statement, with an addendum explanatory to some extent, has been signed. I hold here the original; it has been signed by five representing New Mexico, five representing Texas and five representing the Republic of Mexico. The resolution which was adopted yesterday read: "*That we heartily approve the valuable work of the Reclamation Service under the Department of the Interior of Washington, whose officers of the Rio Grande have been in New Mexico and elsewhere, and we heartily endorse and approve the proposal of building the Elephant Butte dam as a happy solution of a vexed question that has embarrassed the parties interested, providing that an equitable distribution of the waters of the Rio Grande with due regard to the rights of New Mexico, Texas and Mexico.*"

THE OFFICIAL PROCEEDINGS OF THE TWELFTH NATIONAL IRRIGATION CONGRESS HELD AT EL PASO, TEXAS, NOV. 15-18, 1904, at 107 (Guy Elliott Mitchell, ed. 1905)

[hereinafter, 1904 PROCEEDINGS OF TWELFTH NATIONAL IRRIGATION CONGRESS] (emphasis added) (**DVD Doc. 2**).

The National Irrigation Congress sweepingly approved a resolution adopting Reclamation's proposal, notably including the acceptance that Reclamation would allocate the waters of the Rio Grande among New Mexico, Texas, and Mexico, not based upon the parties' historical usage or priorities, but based upon Reclamation's research and science. *Id.* at 107-09. In endorsing Reclamation's proposal, Mexican delegates suggested they would rely upon "surveys to be made by the engineers of the United States Reclamation Service to determine the number of acres upon the Mexican side of the Rio Grande which can be so irrigated." *Id.* at 108. The American delegates "heartily and unanimously endorse[d] the above statement and presentations, made by the honorable delegation representing the Mexican republic, and through them, the Mexican side of the Rio Grande valley. . . ." *Id.* As concluded by Governor Prince: "[N]ow that all obstacles are removed, now that all have agreed to accept the dictum of the authorities on the subject at Washington, and to work harmoniously in order that they may be brought to a practical conclusion, it is, as I say, a matter of great congratulations to all of us." *Id.* at 108-09.

In 1905, Congress established the Rio Grande Project, as envisioned by the resolution of the National Irrigation Congress adopting Reclamation's proposal, by ratifying an Act to allow the construction of a dam "near Engle, in the Territory of New Mexico, on the Rio

Grande, to store the flood waters of that river." Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Act allowed Reclamation to proceed with the dam's construction "as part of the general system of irrigation," only after "ascertain[ing] [whether there be] sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise." *Id.* Congress appropriated no funds from the U.S. Treasury to build the reservoir and dam; rather, Reclamation was charged with identifying and surveying the irrigable lands in New Mexico and Texas to determine if the proceeds from the sale of public land in those States would feasibly pay for the project. *See id.*; *see also* 39 CONG. REC. 1904 (1905). In fact, Reclamation had already performed surveys of irrigable lands in New Mexico and Texas during 1903 and 1904, estimating that 180,000 acres of land to be irrigated in the following distributions, and, in effect, apportioning the waters of the Rio Grande in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin: (i) 110,000 acres in New Mexico; (ii) 20,000 acres in Texas above El Paso; and (iii) 50,000 acres in the El Paso valley below El Paso in Texas and Mexico. *See* 1903-04 RECLAMATION SERVICE REPORT, at 398.

To satisfy the interstate aspect of the compromise reached at the 1904 National Irrigation Congress, the Act of February 25, 1905, also extended the Reclamation Act to include "the portion of Texas bordering upon the Rio Grande which can be irrigated" by the proposed

dam. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. Texas was not included in the original sixteen states and territories identified in the Reclamation Act, as it had entered the Union as a sovereign republic and had contributed no lands to the public domain, the sale of which could underwrite the 1902 Reclamation Act. According to one historian, the extension of the 1902 Reclamation Act to West Texas was of major import to the success of the Rio Grande Project:

> [W]ithout legislation allowing part of the Rio Grande Project to be built in the El Paso Valley, Reclamation Service officials realized that they would have to release waters for lands below El Paso into the riverbed at the southern boundary of New Mexico. This was a potentially wasteful procedure that conflicted with the prevailing sentiments that favored efficient natural resource management. Such a process also would cause a great deal of water to be lost to American farmers in Texas by what were essentially unregulated Mexican diversions along the Rio Grande.

LITTLEFIELD, *supra* note 11, at 114-15.[28]

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[28] In December 1905, President Theodore Roosevelt updated the country on the impact of the 1902 Reclamation Act, stating that "under that act the construction of great irrigation works has been proceeding rapidly and successfully, the lands reclaimed are eagerly taken up, and the prospect that the policy of national irrigation will accomplish all that was expected of it is bright," and adding his recommendation that the Act "should be extended to include the State of Texas." Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), *in* STATE PAPERS AS GOVERNOR AND PRESIDENT 314 (1925). The following year, Congress extended the

In January 1906, pursuant to the 1902 Reclamation Act and in accordance with the laws of the Territory of New Mexico, Reclamation filed in the office of the Territorial Irrigation Engineer of New Mexico a notice of intent to utilize 730,000 acre-feet of water per annum from the Rio Grande for the Rio Grande Project:

> DEAR SIR: The United States Reclamation Service, acting under authority of an act of Congress known as the reclamation act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.
>
> Section 22 of chapter 102 of the laws enacted in 1905 by the Thirty-sixth Legislative Assembly of the Territory of New Mexico, an act entitled "An act creating the office of Territorial irrigation engineer, to promote irrigation development and conserve the waters of New Mexico for the irrigation of lands, and for other purposes," approved March 16, 1905, reads as follows:
>
> > "Whenever the proper officers of the United States authorized by law to construct irrigation works shall notify the Territorial irrigation engineer that the

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Reclamation Act to include the entire state of Texas with the sixteen original Reclamation Act states. Act of June 12, 1906, ch. 3288, 34 Stat. 259.

United States intends to utilize certain specified waters, the waters so described and unappropriated at the date of such notice *shall not be subject to further appropriations under the laws of New Mexico*, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized."

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following-described waters, to wit:

A volume of water equivalent to 730,000 acre-feet per year, requiring a maximum diversion or storage of 2,000,000 miner's inches, said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about 9 miles west of Engle, N. Mex., with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla, and El Paso Valleys, in New Mexico and Texas.

It is therefore requested that the waters above described *be withheld from further appropriation and that the rights and interests*

> *of the United States in the premises be otherwise protected as contemplated by the statute above cited.*

Letter from Benjamin M. Hall, Supervising Eng'r, U.S. Reclamation Serv., to David L. White, N.M. Territorial Irrigation Eng'r (Jan. 23, 1906), *reprinted in* 66 CONG. REC. 597 (1924) (emphasis added).

Two years later, Reclamation followed that notice with a notice of its intent to utilize "[a]ll the unappropriated water of the Rio Grande and its tributaries" for use in the Rio Grande Project:

> DEAR SIR: Claiming and reserving all rights under our former notice of January 23, 1906, addressed to David L. White, Territorial engineer of New Mexico, which said notice advised him of the intention of the United States to use the waters of the Rio Grande for the purpose of irrigation, and is now filed in your office, I do now hereby give you the following notice in addition to said former notice and supplemental thereto:
>
> The United States, acting under authority of an act of Congress, known as the reclamation act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

Section 40 of chapter 49 of the laws enacted in 1907 by the Thirty-seventh Legislative Assembly of the Territory of New Mexico, an act entitled "An act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial engineer; to create a board of water commissioners, and for other purposes," approved March 19, 1907, reads as follows:

> "Whenever the proper officers of the United States authorized by law to construct works for utilization of waters within the Territory, shall notify the Territorial engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory of New Mexico for a period of three years from the date of said notice, within which time the proper officers of the United States shall file plans for the proposed work in the office of the Territorial engineer for his information, and no adverse claim to the use of the waters required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of water described in such notice as may be formally released in writing by an officer of

> the United States thereunto duly authorized: *Provided*, That in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the Territorial engineer shall become public water, subject to general appropriations."
>
> In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following-described waters, to wit:
>
> *All of the unappropriated water of the Rio Grande and its tributaries*, said water to be diverted or stored from the Rio Grande river at a point described as follows:
>
> Storage dam about 9 miles west of Engle, N. Mex., with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla, and El Paso valleys in New Mexico and Texas.
>
> It is therefore requested that the waters above described *be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.*

Letter from Louis C. Hill, Supervising Eng'r, U.S. Reclamation Serv., to Vernon L. Sullivan, N.M. Territorial Eng'r (Apr. 8, 1908), *reprinted in* 66 CONG. REC. 597 (1924) (emphasis added).

3. Irrigation districts are established to guarantee the feasibility of the Rio Grande Project

To assess the feasibility of the Rio Grande Project, Reclamation solicited pledges of acreage from New Mexican and Texan farmers and businessmen to repay the costs of building the Rio Grande Project. By mid-1906, a formal agreement had been struck between Reclamation and two irrigation associations: the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association. *See* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 10-12 (transmitting June 27, 1906 Articles of Agreement as Exhibit B).

That agreement provided "[t]hat only those who are or who may become members of said associations, under the provisions of their articles of incorporation and by-laws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works." *Id.* at 10-11. In addition to providing the terms by which the irrigation associations would "guarantee the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to their shareholders," the agreement further provided

> [t]hat the aggregate amount of such rights to be issued shall in no event exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said associations

> and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that *the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data and to be based upon and measured and limited by the beneficial use of water*[; and]
>
> . . . .
>
> [t]hat in all the relations between the United States and these associations and the members of the associations, the rights of the members of the associations to the use of water where the same have vested, are to be defined, determined and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water; and also by the laws of New Mexico and Texas, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said associations.

Id. at 11-12 (emphasis added).[29]

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[29] Eventually, a corporate transition from water user associations to water districts occurred:

> Despite Congress's reluctance to permit the Reclamation Service to enter contracts with irrigation districts, the district form remained very attractive. Districts could sell bonds and use the proceeds to repay the federal government *immediately* for the cost of construction. They seemed ideally suited to administer

> water projects in which the national government built dams and main canals and the district constructed the distribution and drainage systems. And while the Reclamation Service found it difficult to collect charges from uncultivated or dry-farmed land within its projects, irrigation districts had the power to tax *all* land within their boundaries, including urban real estate, whether the owners chose to irrigate or not.
>
> The irrigation district offered great advantages over water user associations, which prevailed on most of the projects. Water user associations were inherently "undemocratic." They operated on the principle of one acre, one vote, rather than one man, one vote, and they had little authority to discipline members. They were not collection agencies. Every water user had a separate contract and account with the government, which drove up the Reclamation Service's administrative and bookkeeping costs. When farmers refused to repay construction debt, the government filed suits against every farmer in arrears. Nor could water user associations compel project landowners who refused to apply for water rights to pay operation and maintenance charges. By transferring administrative responsibilities to local officials elected by the farmers themselves, it was hoped, much criticism could be diverted away from the Reclamation Service. The Warren Act, which permitted the Reclamation Service to sell surplus water stored in government reservoirs to landowners outside project boundaries, renewed interest in the irrigation district. In many parts of the West, farmers who worked land adjoining federal projects organized irrigation districts with the express purpose of purchasing water.

DONALD J. PISANI, WATER AND AMERICAN GOVERNMENT: THE RECLAMATION BUREAU, NATIONAL WATER POLICY, AND THE WEST 1902-35 at 133-34 (2002). Today, Elephant Butte Irrigation District is the successor water district to the Elephant Butte Water Users Association. *See* N.M. STAT. ANN. § 73-10-1. And El Paso County Water Improvement District No. 1 is the successor water district to the

With the lands of the El Paso Valley incorporated into the purview of the Reclamation Act and the feasibility of the Rio Grande Project confirmed by Reclamation, the interstate aspects of the Rio Grande Project appeared satisfied. Reclamation, however, had estimated that 50,000 acres in the El Paso valley below El Paso in Texas and Mexico could be irrigated through the construction of the reservoir and dam; therefore, Texas's apportionment depended heavily on a resolution by the United States of Mexico's claim to the waters of the Rio Grande.

4. An international convention settles Mexico's claim for damages due to alleged misappropriation of Rio Grande waters by U.S. citizens

The Act of February 25, 1905, reflecting the agreement reached at the 1904 National Irrigation Congress and establishing the Rio Grande Project, did not grant Reclamation authority to deliver any of the waters of the Rio Grande to Mexico. *See* Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. As explained by Representative Stephens of Texas during statements just prior to the passage of the Act:

> I was a member of the irrigation congress at El Paso last November, and was present at the discussions when these agreements were

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El Paso Valley Water Users' Association. *See* EL PASO COUNTY WATER IMPROVEMENT DISTRICT #1, About Us, https://www.epcwid1.org/index.php/organization/about-us (last visited Jan. 6, 2017).

> made, and I wish to state that a full understanding was reached by all the parties at interest, and the dam as proposed in this bill was to be built in New Mexico, more than 100 miles above the line of Texas and old Mexico. . . .
>
> . . . .
>
> . . . The water impounded by this irrigation dam is not to be used in Mexico or turned over to Mexico unless there is, first, a treaty entered into between the United States and Mexico providing for an equitable division of the waters of the Rio Grande River, and providing that the claims of Mexico against the United States for the water Mexico has been deprived of shall be paid by furnishing Mexico with water from this reservoir. This bill does not admit that there is any such claim outstanding against the United States, but provides for determining this question; and we do not furnish Mexico with any water unless the treaty-making power of the United States and Mexico so stipulates.

39 CONG. REC. 1904 (1905).

The issue of Mexico's rights to an equitable apportionment of the Rio Grande had smoldered since the late 1880s. It was not until Texas, New Mexico, and Mexico reached a compromise at the 1904 National Irrigation Congress and the U.S. Congress subsequently green-lighted the Rio Grande Project that a convention between the United States and Mexico became tangible. The eventual realization of a treaty for the

international apportionment of the waters of the Rio Grande between the United States and Mexico depended upon the combined efforts of officials of Reclamation and the U.S. Department of State, Texas representatives and senators to Congress, and individual citizen activists; indeed, Texans participated fully, as they were well aware that the satisfaction of Mexico's claims would directly impact the water allocation Texas received.[30]

In May 1906, the two countries reached an agreement whereby, in exchange for Mexico's waiver of all of claims for damages, and "[a]fter the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto," the United States would deliver to Mexico, without cost, "a total of 60,000 acre-feet of water annually." Convention Between the United States and Mexico providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., arts. I, III & IV, 34 Stat. 2953, 2953-55 [hereinafter Convention of 1906].

D. The Completion and Operation of the Rio Grande Project

After an appropriation of $1 million by Congress in 1907, *see* Act of Mar. 4, 1907, ch. 2918, 34 Stat. 1357, construction of the Elephant Butte dam and reservoir

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[30] For a thorough discussion of the negotiations between U.S. and Mexican representatives, as well as the politics negotiated internally by the various American interests, *see* LITTLEFIELD, *supra* note 11, at 131-45.

began in 1911 and was completed in 1916, *see* RIO GRANDE JOINT INVESTIGATION, at 73.[31]

> Land owners on the Rio Grande Project represented by the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas

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[31] A system of drains was added by 1925. *See* RIO GRANDE JOINT INVESTIGATION, at 73. By 1936, the status of the Project was as follows:

> All old community ditches were taken over by the Project, reconstructed, enlarged, or extended, and incorporated as parts of the present system of more than 630 miles of main canals and laterals through which the waters released from Elephant Butte Reservoir are distributed. There are diversion dams and permanent diversion works at six points along the river. These are Percha Dam at the head of Rincon Valley, diverting to the Arrey canal; Leasburg Dam at the head of Mesilla Valley, diverting to the Leasburg canal; Mesilla Dam southwest of Las Cruces, diverting to the east side and west side canals; the International Diversion Dam opposite El Paso, diverting the Mexican Acequia Madre on the west side and to the Franklin canal on the east side; Riverside Heading about 15 miles below El Paso, diverting to the Riverside canal and Franklin feeder; and Tornillo Heading near the town of Fabens, diverting to the Tornillo canal. The drainage system of the Project is completed except for revisions and reconstruction occasioned by the river rectification programs of the International Boundary Commission and it comprises more than 450 miles of deep open drains.

Id. at 83-84. In 1936, Congress funded the construction of a second storage facility, Caballo Reservoir, a short distance below Elephant Butte Reservoir. *Id.* at 85. That reservoir was completed in 1938. *See* U.S. Dep't of the Interior, Bureau of Reclamation, Rio Grande Project Operations, http://www.usbr.gov/uc/albuq/rm/RGP/index.html (last visited Jan. 6, 2017).

> [had] contracted with the Government for full repayment of construction costs of the Project, except for the million dollars appropriated by the Congress to cover the cost of supplying water to Mexico under the terms of the treaty of 1906.

Id. at 73-74.

But until the late 1920s, the question of how waters from the dam and reservoir would be physically carried and dispersed to consumers downstream complicated many issues as construction and operation of the Rio Grande Project progressed, not the least of which was the remaining issue of the number and location of actual acres in New Mexico and Texas, respectively, that would be irrigated by the Project. With Mexico's allotment of water "fixed" by the Convention of 1906,[32] irrigators in both New Mexico and Texas had

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[32] In 1938, the National Resources Committee reported:

> The International Diversion Dam is owned by Mexico and was built to divert water into the Mexican canal. It is at this dam that delivery must be made to Mexico of 60,000 acre-feet annually under the terms of the treaty of 1906. The Bureau of Reclamation is responsible for this delivery, which must be accomplished largely through releases from Elephant Butte Reservoir, more than 125 miles upstream. The channel of the Rio Grande is thus used to carry water both for delivery to Mexico and for canals serving the Rio Grande Project. Below the Mexican Dam the river channel carries water to the Rio Grande Project canals heading below El Paso. In spite of its dual obligation to deliver water to Mexico and to the Rio Grande Project canals, the United States neither owns nor controls this carrying channel from Elephant Butte to the Mexican Dam.

an interest in seeing the maximum number of acres irrigated by the Project. By 1928, the actual number of acres irrigated by Reclamation through the administration of the Rio Grande Project was approximately 88,000 in New Mexico and 67,000 in Texas. *See id.* at 74-75.[33]

> Since quantities of water considerably in excess of 60,000 acre-feet must pass the Mexican Dam to supply Project canals below El Paso, and since the United States has no control over Mexican diversion to the Acequia Madre at the west end of the dam, which lies in Mexican territory, it has never been possible to deliver exactly 60,000 acre-feet to Mexico or to determine accurately the extent of the Mexican diversion. As a result of this situation, *it is indicated that the diversions by Mexico have exceeded the treaty specification by substantial amounts*. Moreover, there are other Mexican ditches heading on the river below Juarez and having no rights under the treaty, into which water is diverted if and when possible.

RIO GRANDE JOINT INVESTIGATION, at 84 (emphasis added).

[33] Irrigation of those acres included direct deliveries of water as well as return flows. *See id.* at 49. As explained by the National Resources Committee:

> In the main river valleys of the upper basin a supply of considerable magnitude is water which, once diverted for irrigation, returns to the stream as direct drainage or as inflow from the ground-water basin. This "return water" has its source (1) in losses from canals or other conduits during conveyance of water from points of diversion to points of use, (2) in surface drainage from the land after irrigation, and (3) in seepage to the underground basin. . . . Below the San Acacia diversion at the head of Socorro Valley the return flow is lost for use in the Middle Valley but passes on to the Elephant Butte Reservoir and ultimate use in the Elephant Butte-Fort Quitman section. In [that section] the

E. The 1929 Interim Rio Grande Compact

1. The Rio Grande Compact Commission is established to address the 1896 embargo still in force

After Mexico filed its formal claim for damages in October 1894 alleging misappropriation of Rio Grande waters, the Secretary of the Interior in response established an embargo in December 1896, suspending all development and further appropriation of Rio Grande waters on public land in Colorado and New Mexico indefinitely. *See* discussion *supra* Part III.B.4. In the two decades following the imposition of the 1896 embargo, landowners and irrigators, primarily from Colorado's San Luis Valley, "where the burden of the embargo [was] most keenly felt," registered complaints and protests concerning the continuance of the embargo. 66 CONG. REC. 591 (1924). Ottamar Hamele, special attorney for Reclamation, summed up the arguments in a report submitted to the House of Representatives:

> On the part of the complainants it has been urged (a) that the embargo is a restriction on the use of water and is in conflict

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return water of each subvalley becomes available to that next lower as far as the Tornillo heading of the Rio Grande Project. Below this, return water is available to the Hudspeth County Conservation and Reclamation District.

In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.

Id. at 47, 49.

> with the enabling act of March 3, 1875 (18 Stat. 474), under which Colorado was admitted to the Union; (b) that the right of way act of March 3, 1891 (26 Stat. 1095), makes a grant, and the Secretary of the Interior has no authority to withhold this grant, as demanded by the embargo; and (c) that diversions in Colorado will not adversely affect the Government project.
>
> On the other hand, the United States contends (a) that the enabling act of March 3, 1875, reserves to the Federal Government full authority over its public lands; (b) that the right of way act of March 3, 1891, gives the Secretary of the Interior a discretion to refuse to approve an application for a right of way when in his opinion it is contrary to the public interest to do so; and (c) that as a condition precedent to the approval of any application it must appear clear that the Government project will not be injured thereby.

Id.

Between 1896 and 1923, the Secretary of the Interior had modified the embargo, but nevertheless maintained it, severely limiting the grants of rights-of-way for irrigation purposes in the Upper Rio Grande Basin.[34] "Complaints against the embargo finally brought

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[34] *See* Letter from D.R. Francis, Sec'y of the Interior, to Comm'r of the Gen. Land Office (Jan. 13, 1897), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 3 (1911) (modifying embargo to allow grants of rights-of-way for irrigation using the Pecos River because that tributary reaches the Rio Grande south of Juarez and, therefore,

would not impact the issues concerning the irrigable area at Juarez); Letter from E.A. Hitchcock, Sec'y of the Interior, to Comm'r of the Gen. Land Office (May 25, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 3-4 (1911) (modifying embargo to allow approval of rights-of-way over public lands initiated by field surveys based upon notices of appropriation of water filed under laws of Colorado prior to March 1, 1903); Letter from Thomas Ryan, Acting Sec'y of the Interior, to Comm'r of the Gen. Land Office (July 10, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 4 (1911) (modifying embargo to require all current and future applications for rights-of-way to be submitted "to the Director of the Geological Survey to ascertain whether they will conflict with the obligations of the United States, under the treaty with Mexico, recently ratified, or with the Rio Grande or any other project of the Reclamation Service"); Letter from Thomas Ryan, Acting Sec'y of the Interior, to Comm'r of the Gen. Land Office (Sept. 27, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 4 (1911) (rescinding order of December 5, 1896 establishing embargo and all modifying orders but ordering that "before any applications involving the use of the waters [of the Rio Grande] in Colorado and New Mexico are submitted for final departmental action by [the General Land Office] they be first submitted to the Director of the Geological Survey to ascertain whether favorable action thereon would interfere with any project of the Reclamation Service or with the obligations of the United States under the treaty of May 21, 1906 with Mexico"); Letter from Frederick H. Newell, Dir., U.S. Reclamation Serv., to J.R. Garfield, Sec'y of the Interior (Apr. 25, 1907), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 5-6 (1911) (requesting and receiving approval to modify embargo to approve applications for rights-of-way showing that parties' rights to irrigation were initiated prior to March 1, 1903 when the Reclamation Service began active operations for the Rio Grande Project and those requesting diversion of water less than 1000 acre-feet per annum); Letter from Arthur Powell Davis, Dir. U.S. Reclamation Serv., to Albert B. Fall, Sec'y of the Interior (Mar. 2, 1923), *in* 66 CONG. REC. 599, 600 (1924) (requesting and receiving approval to modify embargo to allow the Reclamation Service "to negotiate

forth the suggestion that a commission should be named to make a study of the water supply and draft a form of compact between the States affected under which an equitable allocation of the use of the waters of the Rio Grande would be made to each State." *Id.* That commission would become known as the Rio Grande Compact Commission.

New Mexico and Colorado both sanctioned compact negotiations by enacting laws authorizing the appointment of a representative on the Rio Grande Compact Commission. *See* Act of Mar. 12, 1923, ch. 112, 1923 N.M. Laws 175; Act of Mar. 20, 1923, ch. 192, 1923 Colo. Sess. Laws 702. In December of 1923, President Coolidge named Secretary of Commerce Herbert Hoover as the representative of the United States on the Rio Grande Commission. 66 CONG. REC. 591 (1924).[35]

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for the release of specific areas of public land for purposes of water storage under conditions that will best conserve and utilize the water resources and will protect vested rights in all parts of the Rio Grande Basin – such negotiations to be subject to the approval of the Secretary of the Interior, and, prior to such approval, to be subject to the scrutiny of all interested parties").

[35] The governors of New Mexico and Colorado requested federal representation on the Commission. Secretary of Commerce Herbert Hoover served on the Commission initially, but was replaced in 1928 by U.S. Assistant Attorney General William J. Donovan after Hoover resigned to fill the Office of the Presidency. When the Commission reconvened in 1934 to negotiate a permanent compact, President Franklin D. Roosevelt directed Sinclair O. Harper, Chief Engineer of the Bureau of Reclamation, to represent the federal government on the Commission. *See* Rio Grande River Compact Commission, Proceedings of the Rio Grande Compact Conference Held at Santa Fe, New Mexico, December 10-11,

The Rio Grande Compact Commission, including an unofficial Texas delegate, first met on October 26,

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1934, at 1, *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 1, *available at* http://lib.colostate.edu/archives/findingaids/water/wdec.html#series7 (last visited Jan. 6, 2017). Mr. Harper summarized the role and scope of federal representation on the Commission:

> As I understand my duties I will act largely in the capacity of an observer and referee, or any other term you may call it, and I propose to represent the interests of the government only so far as they are affected by the Treaty with Mexico of 1906, and the investment which the government has in the Rio Grande project in New Mexico and Texas.

Id. The federal representative was not a voting member of the Commission. As discussed by the state representatives to the Commission and confirmed by Mr. Harper in 1934:

> SENATOR McGREGOR [of Texas]: To be sure we understand this, for instance if the three states agree on a compact, I don't think his (Harper's) negation would destroy that compact. I don't think he has a vote on it, in other words.
>
> MR. CARR [of Colorado]: I don't think so; he is presiding officer without vote.
>
> MR. HARPER: I think that can be answered by referring to the Compact of 1929 which the three Commissioners signed, and at one side it was approved by the representative of the government. Even though that were not the rule, as a matter of policy the representative of the government will act as Referee, for want of a better word, or umpire, and will only express his opinions when he considers the interests of the government, as represented by these two contacts which I just mentioned [the Rio Grande Project and the Convention of 1906], are affected.

Id. at 2.

1924, in Colorado Springs, Colorado, before any legislative act had been passed granting authority for a representative of Texas to sit on the Commission; indeed, anxiety existed as to Texas's participation in compact talks. Colorado's Act authorizing the appointment of a representative included specific reference to the option of Texas's participation on the Commission. *See* 1923 Colo. Sess. Laws at 702. But New Mexico's Act did not. *See* Transcript of First Meeting of Rio Grande River Compact Commission 11 (Oct. 26, 1924) (statement of Julian O. Seth of New Mexico), *available at* http://dspace.library.colostate.edu (search "Transcript of First Meeting of Rio Grande River Compact Commission") (last visited Jan. 6, 2017) ("The New Mexico act certainly omits Texas, presumably, I think, on the theory that all the area above Fort Quitman, which is scarcely entirely true, but on the theory nevertheless, that the Reclamation Service represented practically all of the area."). But New Mexico, as a general matter, was not opposed to Texas's participation, as its buy-in would be necessary if, ultimately, an adjustment of Texas's water allocation under the Rio Grande Project became necessary:

> In my district, the one warning I get from the water users, in going ahead with this procedure, is the possibility that our interests at sometime may be different from the interests of the El Paso Valley, and that unless we are very careful, that we proceed with the full acquiescence of the people in the lower valley, there may be questions of water supply which may at some time limit the project, and which

> might be interpreted by our friends below as being a limitation which would effect New Mexico's interest only. We have the City water supply of El Paso that may come up, and our people are a little bit doubtful of the propriety of going ahead unless Texas is fully and legally represented in every respect.

Id. at 18-19 (statements of Joseph Taylor of New Mexico).

Colorado, on the other hand, feared that Texas unfairly had the full support of Reclamation and would use that support to increase its water allotment if allowed to participate on the Commission:

> People of the San Luis Valley have been disturbed with the fear and apprehension that Texas would come forward and claim water for the irrigation of land near Brownsville [at the southernmost tip of Texas on the Rio Grande and border of Mexico], feeling that the burden of such a demand which they think would be unjust would naturally fall upon the source of supply, the major portion of which is in Colorado. . . . Frankly, this is the way they feel. For years and years they have sought by every method within their command, and especially in the years when they had the finances to proceed, to have a reasonable removal of what is known as the Embargo Act on Development. Those efforts have been futile. The Reclamation Service, as a matter of ample caution, has held firmly to this position. It has caused a feeling that the whole lower end of the river is against the upper, and that

> what New Mexico and Texas want to do is to strangle future developments in the upper country. Now, naturally that has put them in a frame of mind that they look with apprehension upon the coming in of Texas, for fear of the Brownsville demands. . . .

Id. at 24-25 (statements of Delph Carpenter of Colorado). Secretary Hoover provided comments on the political prudence of having Texas's participation:

> The people of the San Luis Valley are the ones who are most anxious to have the situation cleared up. Assuming that a compact was arrived at between New Mexico and Colorado, it must come before Congress, and with the opposition of the State of Texas, if they were not a party to it, it would stand but little chance of passing. It would be very seriously jeopardized.

Id. at 31. In the end, the members of the Rio Grande Compact Commission agreed that Texas's involvement in compact talks was required and they adjourned the business of the Commission until Texas passed an act authorizing the appointment of a representative to serve on the Commission. *Id.* at 35-36. Texas passed such an act to appoint a commissioner in 1925. *See* Act of Mar. 26, 1925, ch. 117, 1925 Tex. Gen. Laws 301.

2. The Secretary of the Interior lifts the 1896 embargo, causing compact negotiations to break down

In March 1923, Secretary of Interior Albert B. Fall somewhat loosened the grip that the 1896 embargo had upon the San Luis Valley by modifying the embargo to allow applications for grants of rights-of-way and canals for irrigation purposes to be considered by Reclamation on a case-by-case basis. *See supra* note 34. But Secretary Fall resigned later that month and Hubert Work of Colorado replaced him as Secretary of the Interior. On May 20, 1925, Secretary Work vacated the 1896 embargo order entirely. *See* RIO GRANDE JOINT INVESTIGATION, at 67; Delph E. Carpenter, *Rio Grande Water Controversy* 1 (1926), *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 24, Folder 29 [hereinafter Carpenter, *Rio Grande Controversy Paper*], http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (last visited Jan. 6, 2017).

That act, coupled with the Secretary of the Interior's approval of an application for a right-of-way to complete the Vega Sylvestre dam and reservoir in Colorado weeks earlier, prompted the immediate withdrawal of the delegate from New Mexico to the Rio Grande Compact Commission. *See* Carpenter, *Rio Grande Controversy Paper*, at 2. It appeared that New Mexico planned on litigating, rather than negotiating, its disputes regarding appropriation of Rio Grande waters in the San Luis and Middle sections of the Upper

Rio Grande Basin. As explained by Governor Hannett of New Mexico to Governor Morley of Colorado:

> I have heretofore made New Mexico's attitude plain to representatives of your state particularly Mr. Carpenter. The lifting of the embargo by Secretary Work and granting the right for construction of Vega Sylvester Dam and other permits in our judgment gravely threatens New Mexico's priorities in waters of Rio Grande. We cannot sit idly by negotiating while Colorado interests appropriate water. New Mexico will open up negotiations only on one condition and that is that the interests which have acquired Vega Sylvester permit first cancel and surrender whatever claim they have, all to be subject to terms of any compact entered into by the states. No one regrets proposed litigation more than myself but our rights must be reserved and respected.

Telegram from A.T. Hannett, Gov. of N.M., to Clarence J. Morley, Gov. of Colo. (Oct. 11, 1926), *reprinted in* Carpenter, *Rio Grande Controversy Paper*, at 3.

3. A temporary compact is negotiated

But as New Mexico prepared to litigate its Rio Grande claims, it and other states experienced significant legal challenges in ratifying and administering earlier interstate compacts – specifically the Colorado River Compact and the La Plata River Compact. *See*

LITTLEFIELD, *supra* note 11, at 188. "Moreover, disastrous flooding throughout the entire Mississippi River valley in 1927 had emphasized the need for concerted and unified responses to all of the nation's water resource problems." *Id.* Those events prompted New Mexico to return to the bargaining table, but only for the period of time remaining before its case was ready to be filed against Colorado. *Id.*

On December 19, 1928, the Rio Grande Compact Commission reconvened and signed a compact on February 12, 1929; that compact was approved shortly thereafter by the legislatures of the signatory States. *See* Act of May 22, 1929, ch. 9, 1929, Tex. Gen. Laws 29; Act of Apr. 9, 1929, ch. 154, 1929, Colo. Sess. Laws 548; Act of Mar. 9, 1929, ch. 42, 1929, N.M. Laws 61. The compact received Congressional approval in 1930. *See* Act of June 17, 1930, ch. 506, 46 Stat. 767 [hereinafter 1929 Interim Compact].

The 1929 Interim Compact, however, represented only a temporary agreement. As reported by the Commissioner from Colorado:

> The negotiations revealed that final apportionment of the waters of the Rio Grande between the signatory states should not be undertaken until after the conclusion of a concerted effort to obtain construction of a drain from the Closed Basin of the San Luis Valley and construction of a control reservoir at the head of the Rio Grande Canyon near the Colorado-New Mexico boundary.

Letter from Delph E. Carpenter, Comm'r, Rio Grande River Compact Comm'n, to William H. Adams, Gov. of Colorado 1-2 (Mar. 1, 1929), *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 16, Folder 12 [hereinafter 1929 Carpenter Report], http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (last visited Jan. 6, 2017) (reporting on substance of temporary compact). According to one historian,

> [New Mexico] recognized Colorado's desire to increase development in the San Luis Valley, but [it] thought this could be done by draining the waterlogged part of the valley commonly known as the "dead" or "sump" area and more formally designated the Closed Basin. Residents of the San Luis Valley had proposed utilizing this wasted water since as early as 1911, and the recovered water, [New Mexico] believed, could be used elsewhere in Colorado. Such a plan would allow Colorado to enlarge its irrigated acreage and expand its water supplies by as much as 200,000 acre-feet per year with no detrimental effects below the state line. [New Mexico] pointed out, however, that without such drainage, Vega Sylvestre Dam would be a direct threat to Rio Grande Project water rights because it would impound existing flows coming out of the San Luis Valley – an amount of water estimated by [New Mexico] to be about 600,000 acre-feet per year.

LITTLEFIELD, *supra* note 11, at 189 (internal footnotes and citations omitted).

Article II of the 1929 Compact acknowledged the United States' "paramount right and duty" to enter into treaties with foreign sovereigns, but firmly stated the signatory States' belief that the pledge of the Convention of 1906 of 60,000 acre-feet annually to Mexico imposed an unfair obligation on Colorado, New Mexico, and Texas specifically, and not upon all of the States of the Union equally. *See* 1929 Interim Compact, 46 Stat. 768-69.[36] The signatory States were concerned about that obligation; as part of its deliberations, the Commission heard testimony from engineering consultants from each of the signatory States, which confirmed their fear that significant volumes of Rio Grande water were wasted annually. As described by Delph E. Carpenter:

> The complaints of the [1890s] from the vicinity of El Paso gave rise to erroneous opinions respecting the water supply of the Rio Grande and led to a practice of assuming an inadequacy when, in fact, there is still a superabundance. Notwithstanding the construction of several reservoirs in Colorado since 1906, under the modified embargo order, and notwithstanding the irrigation of several thousand acres of newly reclaimed desert land in Texas by the Rio Grande Project and the over irrigation of the lands of that project,

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[36] "[W]hereby in order to fulfill that promise [of 60,000 acre-feet to Mexico annually] the United States of America, in effect, drew upon the States of Colorado, New Mexico, and Texas a draft worth to them many millions of dollars, and thereby there was cast upon them an obligation which should be borne by the Nation. . . ." 1929 Interim Compact, 46 Stat. 769.

> the uncontradicted evidence submitted to the Rio Grande Commission in the hearings preceding the concluding of the compact, proved that there is an average annual waste of more than 400,000 acre feet of water at the lower end of the Rio Grande Project, controlled by the Elephant Butte Reservoir, and that more than 200,000 acre feet of this is needlessly wasted. This project is the lowest on the river and reveals the net excess after satisfying all demands upon the river. It is freely admitted by representatives of the United States in charge of Elephant Butte Reservoir that there has been a large annual wastage of water because of lack of necessity for its use. These facts were first brought to light at the hearing before the Commission and had not been generally made known to the people of the three interested states.

1929 Carpenter Report, at 13-14. Therefore, the need to collect accurate data regarding water supply and river flows was of paramount importance to the Rio Grande Compact Commission, and would be required before any final apportionment agreement could be reached. But as a first step, the 1929 Interim Compact envisioned the Unites States' funding of a drain for the Closed Basin and a reservoir near the Colorado-New Mexico border in which to store the waters captured by the drainage works. 46 Stat. at 769.

Articles III, IV, and VI provided for temporary river regulation, which included the construction and use of stream-gauging stations along the Rio Grande;

information-sharing of the data from those stations; the establishment of a tri-state engineering committee, whose jurisdiction "shall extend only to the ascertainment of the flow of the river and to the prevention of waste of water"; and an agreement that Colorado and New Mexico may use in equal parts any spill from Elephant Butte Dam. *Id.* at 769-70.

Through Article VII, the drafters of the 1929 Interim Compact made clear they intended merely to preserve the status quo until 1935, when a final equitable apportionment would be determined after the Closed Basin drainage works and reservoir were completed and data had been collected regarding how much return flow the Closed Basin drain would provide. *Id.* at 771. As summarized by Delph Carpenter:

> Article VII provides that final equitable apportionment of the waters of the Rio Grande among said states is to be made by a compact to be negotiated by a Commission to be appointed not later than June 1, 1935. Such Commission shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the present compact (February 12, 1929) and not as of conditions obtaining in 1935 and thereafter and no advantage or right shall accrue or be asserted by reason of construction of works, reclamation of land or other changes in conditions or in use of water during the time intervening between the signing of the present

> compact and the concluding of such subsequent compact to the end that the rights and equities of each state may be preserved unimpaired. . . .
>
> . . . .
>
> Authentic records of water supply and of river flow at different points will be imperative for the work of the future Commission, for a comprehensive knowledge of river conditions and for purposes of future allocation and administration. These records may be obtained only by the maintenance of stream gauging stations equipped with automatic recorders and by cooperation by the water officials of the three states.

1929 Carpenter Report, at 2-3, 6.[37]

So the "primary objective" of the 1929 Interim Compact was to procure federal funding for the building of the Closed Basin drain and reservoir "for the purpose of putting water in the river that is not perpetual, in order to give us a cushion upon which a fair adjustment could be made." Rio Grande River Compact Commission, Proceedings of the Rio Grande Compact

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[37] The 1929 Interim Compact carved out Colorado's "right to divert, store, and/or use water in additional amounts equivalent to the flow into the river from the drain from the Closed Basin," as the Commission recognized that the delivery of that water into the Rio Grande represented new water, not tributary water. *See* 1929 Compact, 46 Stat. 771. Delph Carpenter was clear in his report to the Colorado governor that "[t]h[e] [Closed Basin] proviso is a mandate to the future Commission." 1929 Carpenter Report, at 3.

Conference Held at Santa Fe, New Mexico, Dec. 10-11, 1934, at 6, *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 1 [hereinafter 1934 Rio Grande Compact Comm'n Proceedings], *available at* http://lib.colostate.edu/archives/findingaids/water/wdec.html#series7. To preserve the signatory States' rights and equities until a final compact could be ratified down the road, Colorado agreed in Article V of the 1929 Interim Compact that, "until the construction of the Closed Basin Drain and . . . Reservoir," it would "not cause or suffer the water supply at the interstate gauging station to be impaired by new or increased diversions or storage within the limits of Colorado unless and until such depletion is offset by increase of drainage return." 1929 Interim Compact, 46 Stat. 770. New Mexico made similar guarantees in Article XII:

> New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.

Id. at 772. With "[e]ngineering studies lead[ing] to the conclusion that with completion of the proper works [*i.e.*, the Closed Basin drain and reservoir], the water supply [of the Rio Grande] is more than ample for all needs," *see* 1929 Carpenter Report, at 17, the States'

commitments to maintain the status quo until such time as a final compact could be ratified protected the apportionments of water made below Elephant Butte by Reclamation through administration of the Rio Grande Project.

In sum, the 1929 Interim Compact

> permanently provide[d] for the construction of the State Line Reservoir and the Closed Basin drain and permanently settle[d] the disposition of the waters of the drain and the relations and rights of those building and using the reservoir. Most of its other provisions [were] temporary but it set[] at rest a potential interstate controversy and provide[d] an orderly and constructive method for its future settlement.

Id. at 17-18.

F. The 1938 Rio Grande Compact

1. The Rio Grande Compact Commission reconvenes on the eve of the expiration of the 1929 Interim Compact

The stock market crash of 1929, occurring within months after the ratification of the 1929 Interim Compact, and the ensuing economic depression, halted the construction of the Closed Basin drain and reservoir until 1934. As the June 1935 deadline contained within the 1929 Interim Compact loomed, the Rio Grande Compact Commission reconvened on December 10, 1934, despite the fact that no drainage works had been

initiated and no data on availability and volume of return flow had been collected.[38]

Colorado pressed for a final, "perfect and regulated" apportionment of water and considered that determination to be the "main reason" for reconvening the Commission. 1934 Rio Grande Compact Comm'n Proceedings, at 16, 22. Colorado asserted that, pursuant to the 1929 Interim Compact, the Closed Basin drainage water was a Colorado asset existing outside of the waters of the Rio Grande, and, therefore, did not bear upon the equitable apportionment of those waters. *Id.* at 24. To that end, Colorado argued for "parity" with New Mexico and Texas, based upon "present requirements." *See id.* at 12-13, 24.

Texas, supported by New Mexico, strenuously objected to and viewed as premature Colorado's pursuit of a final, equitable apportionment of Rio Grande waters; Texas simply questioned: (i) whether Colorado planned to take advantage of the recent federal grant offered to it for the purpose of constructing the Closed Basin drain; and (ii) whether it wanted to extend the 1929 Interim Compact until such time as the drain and reservoir could be built and data regarding the volume of return drainage water from the Closed Basin could

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[38] By the time the Rio Grande Compact Commission reconvened in December 1934, "[t]he Public Works Administration ha[d] made an appropriation of $900,000 to construct a drain from the closed in basin in Colorado to the Rio Grande . . . commonly referred to as the sump area . . . , [which had to] be accepted or rejected soon." 1934 Rio Grande Compact Comm'n Proceedings, at 5.

be obtained. *See id.* at 23-33. As stated by Major Richard F. Burges of Texas:

> Our position is this: It is impossible to make an allocation of the waters of the Rio Grande until we know what waters there are. That cannot be known until the sump drain is constructed and its result manifested. That being true, we cannot conceive that we could, even if we wanted to, arrive at any permanent settlement of the matter. . . . Our second question was predicated upon this idea: If Colorado is going ahead with the drain – and we are constrained to believe it would be very unwise not to use that appropriation – then there should be such a temporary extension. You gentlemen all recall the compact expressly provides for that temporary extension as would permit the realization of that plan, and when that has been done we would then face the situation which we faced, as we thought five years ago, and that is, it would not be possible to arrive at a permanent allocation until we know what there is to allocate, and we cannot know that until this intermediate step is taken. That was the definite position of Colorado at that time, and it was ours, and I don't see that position has been changed, except we do know we can get that drain at federal cost. . . . [B]ut we cannot permanently allocate the waters of the Rio Grande until we know what they are, and we cannot know that until the drain is constructed and its return indicated.

Id. at 23-24. With that impasse, and even after a second round of meetings in January 1935, the Rio

Grande River Compact Commission adjourned, passing a resolution "recommending that the present Compact be extended for a period of two years, to June 1, 1937." *See* Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Dec. 2-3, 1935, at 1, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Dec. 1935 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 3**). The legislatures of all three states extended the 1929 Interim Compact for two years to June 1, 1937. *See* Act of Apr. 18, 1935, ch. 87, 1935 Tex. Gen. Laws 209; Act of Apr. 13, 1935, ch. 188, 1935 Colo. Sess. Laws 983; Act of Feb. 25, 1935, ch. 77, 1935 N.M. Laws 175. Congress approved that extension in June 1935. *See* Act of June 5, 1935, ch. 177, 49 Stat. 325.

2. The National Resources Committee is called upon to triage and assist in the resolution of the interstate water dispute in the Upper Rio Grande Basin

In part to deal with a lawsuit filed by Texas against New Mexico and the Middle Rio Grande Conservancy District in October 1935 over perceived misappropriation of Rio Grande waters, President Franklin Roosevelt assigned the National Resources Committee the task of cooperating with the three States represented by the Rio Grande Compact Commission "in gathering facts that might be helpful

in arriving at a solution of the interstate water problem on the Rio Grande above Fort Quitman." 1938 RIO GRANDE JOINT INVESTIGATION, at 10. Indeed, the federal government viewed itself as a party to the 1929 Interim Compact with "direct concern and weighty interest" in resolving any issue regarding the distribution of Rio Grande waters. Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 5 ("[The federal government], no less than your three states, is a party to the existing Rio Grande Compact. . . .") (statement of Professor Harlan Barrows of the National Resources Committee) (**DVD Doc. 3**); *see also* Letter from President Franklin D. Roosevelt to Fed. Agencies Concerned With Projects or Allotments for Water Use in the Upper Rio Grande Valley Above El Paso (Sept. 23, 1935), *reprinted in* Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 2 (referring to the federal government as a "party" to the 1929 Interim Compact).

Accepting the assistance of the National Resources Committee, the Rio Grande River Compact Commission resolved

> [t]hat the National Resources Committee, through the Water Resources Committee, be requested, in consultation with the members of the Rio Grande Compact Commission, to arrange immediately for such investigation (1) of the water resources of the Rio Grande Basin above Fort Quitman, (2) of the past, present and prospective uses and consumption of water in such Basin in the United States, and (3) of opportunities for conserving and augmenting such water resources by all feasible

> means, as will assist the Rio Grande Compact Commission in reaching a satisfactory basis for the equitable apportionment of the waters of the Rio Grande Basin in the United States above Fort Quitman, as contemplated by such Rio Grande Compact.

Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 42 (**DVD Doc. 3**). But the cooperative investigation of the National Resources Committee was "limited to the collection, correlation and presentation of factual data, and shall not include recommendations, except upon request of the Rio Grande Compact Commission," and would be conducted "in harmony with the spirit and intent of the [1929 Interim] Rio Grande Compact." *Id.* at 43. "To accomplish th[e] investigation efficiently, expeditiously, and impartially within the period available," and with the approval of the Rio Grande Compact Commission, the National Resource Committee partnered with several federal agencies, including the USGS, the Bureau of Agricultural Engineering, and Reclamation. RIO GRANDE JOINT INVESTIGATION, at 11.

But the extension of the 1929 Interim Compact granted by the States' legislatures and Congress was due to expire on June 1, 1937, before the time the National Resources Committee's report would be completed. Moreover, the lawsuit filed by Texas against New Mexico and the Middle Rio Grande Conservancy District cast a shadow of uncertainty over the likelihood of a permanent compact being reached. Thomas

M. McClure, the Commissioner from New Mexico, convened a meeting of the Rio Grande Compact Commission in March 1937 to proffer New Mexico's position:

> It seems that [New Mexico's] position under the Compact has been changed a little bit since our last meeting in which the Compact was extended. Our idea of the compact was more or less status quo of conditions on the river; to hold in that condition until some permanent compact could be drawn up in which there could be equitable distribution of the waters. But, as I see it, the position of New Mexico is not that now, as we are in a law suit in the Supreme Court. Under the present compact it is questionable what effect that suit will have on New Mexico and at the present time it has not been definitely settled in New Mexico's mind what we should do about it.
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> . . . .
>
> New Mexico has always been a compact state. We realize that it is the compact which in most cases prevents expensive and long drawn out litigation and we believe in compacts, and were well satisfied with the [1929] compact up until the time that we were sued on a more or less technicality in the provisions of the compact. . . .

Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Mar. 3-4, 1937, at 3, 6, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph

Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Mar. 1937 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 4**). M.C. Hinderlider, the Commissioner for Colorado, conceded that "there is an element in [Colorado], particularly in the San Luis Valley, which is at this time lukewarm toward extending the life of the present Compact." *Id.* at 5. Ultimately, the Commissioners, in consultation with the Governors of their respective States, resolved to recommend to the legislatures and Congress to extend the 1929 Compact only to October 1, 1937, with the understanding that the rights of the parties to the litigation, particularly those of New Mexico, would not be impaired by the extension. *Id.* at 24. As explained by A.T. Hannett, attorney for the New Mexico Interstate Stream Commission:

> I think it is fruitless for us to discuss the extension beyond October 1st of this year. If we were to go before the Governor and tell him what the true situation is as to the pending litigation and this proposed extension and be frank with him as we must necessarily be, I am sure he would dispense with our services and you would have to deal with another lawyer and another engineer. I am convinced that the people of our state would not ratify an extension that would jeopardize our defenses in the pending litigation.

Id. at 22. Pursuant to the resolution of the Rio Grande Compact Commission, each State's legislature ratified an extension of the 1929 Interim Compact to October 1, 1937. *See* Act of Apr. 26, 1937, ch. 226, 1937 Tex. Gen.

Laws 440; Act of Apr. 19, 1937, ch. 228, 1937 Colo. Sess. Laws 1056; Act of Mar. 13, 1937, ch. 96, 1937 N.M. Laws 256.

In August 1937, the National Resources Committee completed its report entitled, *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas 1936-37*. *See* Letter from Frank Adams & Harlan H. Barrows, Rio Grande Joint Investigation, to Abel Wolman, Chairman, Water Resources Committee, National Resources Committee (Aug. 10, 1937), *in* RIO GRANDE JOINT INVESTIGATION (transmitting report). The Rio Grande Compact Commission reconvened in late September 1937 to review the *Rio Grande Joint Investigation*, despite the fact that the National Resources Committee had published the report late and, therefore, the report was not made readily available in its completed form for all Commission members prior to the meeting. *See* Rio Grande River Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Sept. 27 to Oct. 1, 1937, at 1, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Sept. 1937 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 5**).

Nevertheless, when the Commissioners reconvened to review the *Rio Grande Joint Investigation*, each State presented in writing "the views they entertain as to the minimum conditions under which [each State] would be willing to negotiate." *Id.* at 9. As to the

subject of a specific apportionment of water to Texas, Colorado appeared to import the "status quo" articulated in Article VII of the 1929 Interim Compact to the negotiations of the final compact: " . . . [A]nd that the Commission so named shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the Compact." *Id.* at 10, 54. The "conditions obtaining on the river" at the signing of the 1929 Interim Compact included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation.

New Mexico's opening position also equated the apportionment owed to Texas with that allocated to the Rio Grande Project: "New Mexico is willing to negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled." *Id.* at 12, 59.

In one paragraph, Texas stated its position. Although Texas would have liked to have benefited from Colorado's and New Mexico's future reclamation projects, built to contribute more water into the Rio Grande, it nonetheless recognized and agreed that its allocation was tied directly to the amount released by the Rio Grande Project and negotiated for both the quantity and quality of that Project water:

> Although the State of Texas feels that it should share in the benefits from new works for the augmentation of the water supply of the Rio Grande, it will not insist thereon, provided that the States of Colorado and New Mexico will release and deliver at San Marcial a supply of water sufficient to assure the release annually from Elephant Butte Reservoir of 800,000 acre-feet of the same average quality as during the past ten years, or the equivalent of this quantity if the quality of the supply is altered by any developments upstream.

Id. at 13, 60.

With the position statements assuming that Texas's water allotment would be inextricable from the Rio Grande Project, each of the three States submitted proposed schedules for water deliveries. *See id.* at 61-65. Of particular concern to Colorado and New Mexico were unauthorized diversions taken by Mexico, above and beyond the volume of acre-feet owed to that Republic under the Convention of 1906, and which State(s) would bear the burden for those diversions. To account for those "over-diversions," Colorado proposed that "[t]he mean required releases from Rio Grande Project storage . . . be considered as 750,000 acre-feet per year," resulting in the burden for Mexico's unauthorized diversions shifting directly to the water districts under the Rio Grande Project. *Id.* at 32, 34.[39]

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[39] R.J. Tipton, consulting engineer to the Commission from Colorado, explained the bases for the proposal:

Although the *Rio Grande Joint Investigation* included massive amounts of new data and information, the members of the Rio Grande Compact Commission could not agree on terms for a permanent Compact "until further research is possible, [with] engineering suggestions for deliveries at the state line and San Marcial, and until the engineers have had an opportunity to check on [the] figures [provided in the *Rio Grande Joint Investigation*]." *Id.* at 52. Therefore, the Rio Grande Compact Commission resolved that one engineer consultant be appointed from each State and the federal government to form a committee

> for the purpose of discussing the engineering features, particularly of the state line deliveries and deliveries at San Marcial, in order to

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> [Colorado's proposal for annual Rio Grande Project releases] was worked out on two bases; the first being 800,000 acre-feet of releases from Elephant Butte, suggested the other day as a mean release over a period of years, and deducting from that all what appears to have been over-diversions by Mexico in an amount of some 74,000 acre-feet, as I remember, in 1930, up to 1935, and then adding an amount to that, 20 to 30,000 acre-feet, which brings it up around 750,000. Another basis was taking releases from Elephant Butte Reservoir since the signing of the former compact, eliminating the year of low release in 1935, since the operation was materially curtailed that year, but not including the last two years, that amounts to a mean of 783,000. That's eliminating the low releases of 1935, deducting 74,000 acre-feet of over-diversions and then bringing it back up to 750,000 by adding an additional amount.

Sept. 1937 Rio Grande Compact Comm'n Proceedings, at 34 (**DVD Doc. 5**).

> determine if they can arrive at a determination of general principles and if possible agree on the details of the deliveries, and the engineering factual data which should underlie the compact.

Id. at 53.[40] In the meantime, the parties agreed to stay the pending litigation in pursuit of a permanent compact based upon the forthcoming engineering report. *See* Letter from Charles Warren, Special Master, to Frank B. Clayton, Commissioner, Rio Grande Compact Commission (Dec. 21, 1937), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F467 (informing Mr. Clayton of stay granted by Supreme Court) (**DVD Doc. 7**).

The engineering committee submitted its report to the Compact Commission "setting forth certain factual data bearing on the state line flow schedules" on December 27, 1937, and that report was circulated to the Commissioners. Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, Mar. 3d to Mar. 18th,

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[40] The following engineers comprised the engineering committee: E.B. Debler, Hydraulic Engineer of the Bureau of Reclamation for the United States; Royce J. Tipton for Colorado; John H. Bliss for New Mexico; and Raymond A. Hill for Texas. *See* Letter from Comm. of Eng'g Advisors to Rio Grande Compact Comm'n 13 (Mar. 9, 1938) (transmitting second engineers' report), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 6**).

incl. 1938, at 2, *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Mar. 1938 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 8**). Thomas M. McClure, Commissioner for New Mexico, strongly objected to the engineers' report based, among other things, upon the volume of Rio Grande water the engineers' report allocated to Texas:

> I have discussed [the engineers' first report] with others in authority representing the State of New Mexico, and we have reached the conclusion that it would be a waste of time for the compact commissioners to meet and accept the report as a basis for negotiations of a new compact without clarification of the provisions of the report. It is too vague and indefinite in some respects; nor does it set up sufficient of the data used by the committee to work out the relationship of the flow at various stations; *likewise, the report fixes a basis for water supply to the State of Texas, which, in my judgment and in the judgment of others in authority in New Mexico, is so far out of reason that it could not be considered as a basis for negotiation.*
>
> Furthermore, the engineers in their recommendation plainly exceeded their authority. I understand that their authority was to present basic facts upon which the commissioners themselves might arrive at a permanent compact. It appears that, instead of

> reporting accurate basic data, a compromise on basic data was reported.

Letter from Thomas M. McClure, New Mexico State Eng'r and Comm'r, Rio Grande Compact Comm'n, to S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n (Jan. 25, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (emphasis added) (**DVD Doc. 9**).

McClure believed that the engineers should "reassemble at the earliest possible moment and give the matter further study." *Id.* The other commissioners did not agree with McClure's recommendation. *See, e.g.*, Letter from M.C. Hinderlider, Colorado Comm'r to the Rio Grande Compact Comm'n, to S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n (Feb. 4, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 10**).[41] And for

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[41] Because both Texas's apportionment and part of New Mexico's apportionment (the Elephant Butte Irrigation District) of Rio Grande water was to be delivered via the Rio Grande Project, Texas appeared puzzled by New Mexico's objections to the volume of annual normal release by the Project proposed by the Engineer Advisors; Texas was disturbed by New Mexico's seeming unwillingness to advocate for the interests of its citizens in the Elephant Butte Irrigation District. *See* Letter from Raymond A. Hill to Frank B. Clayton (Feb. 8, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc.**

11). Seeking to reduce New Mexico's discord regarding the schedule of deliveries to Texas proposed by the engineering consultants, the Texas delegation planned to request information on contemplated deliveries to the New Mexico-Texas state line, rather than to the Elephant Butte Reservoir (located in New Mexico) to encourage the New Mexico delegation to advocate for the Elephant Butte Irrigation District's interests in addition to those of water users in northern New Mexico:

> In your recent letter to Mr. Harper you alluded to the failure of McClure to consider the interest of Elephant Butte Irrigation District. I have been giving considerable thought to the implications of this situation and believe that the time has come when the State of Texas should cease being the direct representative of an irrigation district situated in New Mexico.
>
> So long as Texas bears the burden of protecting the rights of all lands under the Rio Grande Project, the official attitude of New Mexico is going to be the same as that of Middle Rio Grande Conservancy District. This was clearly brought out in the meetings of the Committee of Engineers when [John H.] Bliss [engineering advisor to the New Mexico Compact Commissioner] not only failed to assist me in discussions with [Royce J.] Tipton [engineering advisor to Colorado Compact Commissioner] but went so far as to make demands which favored Colorado beyond those that Tipton felt justified in making. The only conclusion from Bliss' attitude and from the expressions of McClure is that the use of water below Elephant Butte Dam should be reduced even if the benefit of such reduction would be solely Colorado's. If this attitude is continued into the Compact negotiations, and I see no reason to expect anything else, it will put Texas in an untenable position.
>
> I suggest, therefore, that you present the issue clearly to Judge [Edwin] Mechem [counsel for Elephant Butte Irrigation District] and [N.B.] Phillips [Manager of Elephant Butte Irrigation District]. I think that they, either directly or through political channels, should

> bring pressure on the State Engineer of New Mexico to protect their interests; also, that they should sit in on all conferences of New Mexico interests to the end that the Elephant Butte District may be given the same consideration by New Mexico that the Middle Rio Grande Conservancy District is given. If this is done, the Elephant Butte District can demand of McClure the schedule of deliveries into Elephant Butte Reservoir which will protect the Elephant Butte District. Texas can likewise demand the same schedule of deliveries in the Compact meetings as a protection to the lands in Texas.
>
> In order to accomplish the above and protect directly the interests of Texas land owners and indirectly the interests of all lands in the Rio Grande Project, I suggest that demand be made for the adoption of a schedule of deliveries at Courchesne [at the border of Texas and New Mexico]. . . .
>
> I realize that a similar suggestion was categorically rejected at a general conference just prior to the Compact Commission meeting in October. I believe, however, that the situation is sufficiently changed to warrant such a demand from Texas. In my judgment, the interests of the Elephant Butte Irrigation District will be better served thereby than will be the case if the full burden of providing for deliveries into Elephant Butte Reservoir is placed upon Texas.

Id.

Later in February 1938, the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1 entered into an interdistrict agreement, approved by the Secretary of the Interior in April 1938, which affirmed Reclamation's prerogative under the Reclamation Act of 1902 to apportion waters of the Rio Grande Project and recognized Reclamation's determinations of maximum irrigable acreage between the two districts as a 88:67 ratio, respectively. *See* Contract Between Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas (Feb. 16, 1938), approved by Secretary of the Interior (Apr. 11, 1938), *in* Rio Grande

practical reasons, the federal representative and chair to the Rio Grande Compact Commission recommended that the Commission proceed to meet in March 1938 to ascertain what progress could be made toward a permanent compact. *See* Letter from S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n, to M.C. Hinderlider, Thomas M. McClure, and Frank B. Clayton, at 2 (Feb. 12, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 (**DVD Doc. 13**).

The Compact Commission reconvened in March 1938 to review the findings and recommendations. *See* Mar. 1938 Rio Grande Compact Comm'n Proceedings, at 2 (**DVD Doc. 8**). The New Mexico delegation remained dissatisfied with the engineers' first report, submitting nine complaints, including: (i) an objection to the figure of "800,000 acre feet of water annually" as the "normal release from the Elephant Butte," stating that amount "is far in excess of past and present average releases and is far in excess of their *project needs*"; and (ii) an insistence that "the responsibility of carrying out such treaty provisions [with Mexico] be definitely placed either with the state of Texas or with the United States." *Id.* at 11 (emphasis added).

New Mexico specifically took issue with the engineers' treatment of Mexico's unauthorized diversions

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Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 12**).

as they affected the calculation of the "normal release" from the Elephant Butte Reservoir for Rio Grande Project deliveries – or, stated another way, for Texas's apportionment of the waters of the Rio Grande. *See id.* at 3. The engineers' report recommended that

> the normal release from Elephant Butte Reservoir be deemed to be 800,000 acre-feet per annum, adjusted for any gain or loss of usable water resulting from the operation of any reservoir below Elephant Butte. We also recommend that this normal release be reduced or increased by two-thirds of any change in aggregate diversions and loss to Mexico.

Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 182 (1974) [hereinafter Hill, *Development of the Rio Grande Compact*] (quoting Dec. 27, 1937 report of the Committee of Engineering Advisors). Those recommendations appeared to include in the calculation of the Rio Grande Project's "normal release" Mexico's allotment pursuant to the Convention of 1906 – but also its unauthorized over-diversions – and called for the three States to share *pro rata* any loss due to those unauthorized diversions below Elephant Butte.

Because New Mexico refused to negotiate specific apportionments of water until the engineers addressed its concerns, the Commission agreed to recess, without adjourning, while the engineers' committee considered those concerns, as "the paramount question for arriving at a decision upon this compact is the equitable division of the waters of the river." Mar. 1938 Rio Grande

Compact Comm'n Proceedings, at 14 (statement of M.C. Hinderlider) (**DVD Doc. 8**). The Commission recessed on March 7, 1938, reconvening on March 10, 1938, once the engineers had updated their report. *Id.* at 20; *see also* Letter from Comm. of Eng'g Advisors to Rio Grande Compact Comm'n (Mar. 9, 1938) (transmitting second report), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter 1938 Engineers' Second Report] (**DVD Doc. 6**).

The 1938 Engineers' Second Report followed the format of the first report, including only the engineers' changed recommendations. The report outlined the engineers' processes in reaching the updated recommendations:

> We avoided discussion of the relative rights of water users in the three States, and were guided throughout our work by the general policy – expressed at the meeting of the Compact Commission in October – that present uses of water in each of the three States must be protected in the formulation of a Compact for administration of the Rio Grande above Fort Quitman, because the usable water supply is no more than sufficient to satisfy such needs.

1938 Engineers' Second Report, at 1. In fact, the engineers stated: "We are satisfied that no material expansion of the irrigated area in the Rio Grande Basin

above Fort Quitman will be practicable without importations from other watersheds." *Id.* at 12-13.

Notably, the report defined the following terms:

> Normal Release from Elephant Butte – is equal to an average of 790,000 acre feet per annum; provided that this amount shall be adjusted for any gain or loss in usable water resulting from the operation of any reservoir below Elephant Butte; provided, further, that water released from Elephant Butte reservoir for the generation of power which encroaches on flood control capacity of and which is not subsequently released from another reservoir for irrigation of the Rio Grande project lands plus deliveries to Mexico, shall be deemed to have been released for such purposes, excepting only when such release for power is made by an agency beyond the control of any of the States contrary to the formal protest of New Mexico or Texas or any irrigation district thereof.
>
> Project Storage – is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for storage of usable water between Elephant Butte and Courchesne, but not more than a total of 2,638,860 acre feet.
>
> Usable Water – is all water in Project storage which is available for release in accordance with irrigation demands, including deliveries to Mexico.

> Unusable Spill – is the amount of water which is actually spilled from Elephant Butte Reservoir or released for flood control in excess of the current demand for irrigation of Rio Grande Project lands plus deliveries to Mexico and which is not stored in another reservoir for subsequent release for such uses; provided that, if the actual releases from Elephant Butte Reservoir from the time of previous unusable spill have aggregated more than the sum of the normal releases, the time of occurrence of spill shall be adjusted by the difference between the total actual release and the accrued normal release.

Id. at 8-9. "In the Second Report, the Engineer Advisors reduced the 'normal release' to 790,000 acre-feet, which included the 60,000 acre-foot treaty obligation." William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENVER WATER L. REV. 1, 32 (2001). "In addition, they eliminated from the definition of 'normal release from Elephant Butte' any provision for sharing either in the benefit of Mexico's reduced over-diversions or in the burden of increased deliveries to Mexico." *Id.*

As the engineers had sufficiently addressed all of the Compact Committee's concerns and questions, the Rio Grande Compact Commission adopted the recommendations of the 1938 Engineers' Second Report, including the proposed schedule of deliveries to be made by Colorado and New Mexico, and passed a motion that allowed for a "drafting committee consist[ing] of two attorneys designated by each commissioner and that the committee would actually make a preliminary

draft of the compact for final submission after it is discussed by all of the states and the respective commissioners of the states." Mar. 1938 Rio Grande Compact Comm'n Proceedings, at 31 (**DVD Doc. 8**). The draft compact would "incorporate in substance the report of the engineers and provide administrative machinery. . . ." *Id.* The advisors appointed by the Commissioners included: for Colorado, George M. Corlett, counsel for the Rio Grande Water Users' Association, and Ralph Carr, counsel for the Conejos River Water Users' Association; for New Mexico, A.T. Hannett, Special Assistant Attorney General and counsel for the Interstate Streams Commission of New Mexico, and Fred E. Wilson, counsel for the Middle Rio Grande Conservancy District; and for Texas, Major Richard F. Burges, counsel for the El Paso County Water Improvement District No. 1, and Judge Edwin Mechem, Sr., counsel for the Elephant Butte Irrigation District. *See id.*[42] The

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[42] At first glance, it may appear odd that Texas would appoint a legal advisor from New Mexico to represent Texas's interests in negotiating and crafting the 1938 Compact. But, as explained later in 1938 by Rio Grande Compact Commissioner Frank B. Clayton of Texas to lower Rio Grande water users, the interests of Texas above Fort Quitman (*i.e.*, the El Paso County Water Improvement District No. 1) were completely aligned with Elephant Butte Irrigation District of New Mexico as beneficiaries of the Rio Grande Project:

> [I]f, in those negotiations, we had permitted the conflicting interests in each State to attempt to insert in the compact provisions protecting their own particular requirements, no compact could ever have been arrived at. There is as much controversy in Colorado as in Texas, maybe more, and fully as much in New Mexico as here. You gentlemen know that as far as the Rio

United States did not appoint a legal advisor to the drafting committee, as the only legal advisor to the United States present at the start of the proceedings had a scheduling conflict and was unavailable to meet with the drafting committee. *Id.* at 31-32.

3. A final compact apportioning Rio Grande waters is signed

On March 18, 1938, the Commissioners of the Rio Grande Compact Commission signed a final compact that equitably apportioned the waters of the Rio Grande above Fort Quitman among Colorado, New Mexico, and Texas. The 1938 Compact contains a preamble and seventeen articles, many of which directly

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> Grande project is concerned, the interests of the Elephant Butte District, in New Mexico, and the districts in Texas above Fort Quitman are common interests. We have with us the manager and attorney of the Elephant Butte district, in New Mexico, and because our interests are common we determined long ago that no satisfactory, practical, legal or engineering way could be devised by which the waters could be allocated between these districts at the Texas line. As far as they and we are concerned, our source is the same. If the supply is impaired above Elephant Butte, we all suffer alike. Consequently, from both the legal and practical standpoint there is an identity of interests.

Proceedings of Meeting Held on Friday, May 27, 1938 at El Paso, Texas Between Representatives of Lower Rio Grande Water Users and Representatives of Irrigation Districts Under the Rio Grande Project of the Bureau of Reclamation 11, *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 (**DVD Doc. 14**).

imported the text and tenets of the 1929 Interim Compact. As explained by Raymond A. Hill, Engineering Advisor to the Rio Grande Commission from Texas:

> Although the several schedules of deliveries set forth in Rio Grande Compact were of primary concern to the Rio Grande Compact Commissioners in effecting an equitable apportionment of the waters of the Rio Grande above Fort Quitman, the Compact contains many other provisions of importance, some having to do with administration, others defining special rights of separate States, and others placing limitations upon the separate States.
>
> It is significant that the Committee of Legal Advisers to the Commissioners followed the language of the 1929 Compact insofar as they could do so in preparing the drafts of the 1938 Compact. The preamble is much the same; many of the definitions in Article I are the same; Article XV and Article XVI of the 1938 Compact are almost verbatim copies of Articles XIII and IX, respectively, of the 1929 Compact.

Hill, *Development of the Rio Grande Compact*, at 184.

The preamble designates the purpose of the 1938 Compact:

> The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of

> another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes. . . .

Act of May 31, 1939, ch. 155, 53 Stat. 785. Article I contains definitions of specific terms used in the 1938 Compact. Of note are the following definitions:

> "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet.
>
> "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.
>
> "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.
>
> . . . .
>
> "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.
>
> "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or

> is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

Id. at 786.

Article II identifies twelve locations for stream-gauging stations maintained and operated by the Rio Grande Compact Commission itself or in cooperation with the appropriate government agency and requires that similar stream-gauging systems be constructed and maintained in the future for any reservoir completed after 1929. *Id.* at 786-87.

Article III identifies "[t]he obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line" in an amount determined by schedules that correspond to water quantities at gauging stations on both the Rio Grande and the Conejos River. *Id.* at 787-88. As clarified by M.C. Hinderlider, Colorado's State Engineer and Rio Grande Compact Commissioner:

> Article III sets up the schedules of relationship between the total water supply furnished by the Conejos and its tributaries, and the outflow to the Rio Grande, and also the relationship between the total water supply furnished by the Rio Grande at Del Norte and outflow at the stateline, less contributions from the Conejos River basin, as determined by conditions of inflow and outflow since 1928

> (the former temporary compact provided that the conditions on the river should remain as of 1929), and makes provisions for correcting this relationship between inflow and outflow resulting from new depletions of inflow, or increase of inflow resulting from importation of water from the Colorado River basin.
>
> While the obligation to meet the schedule of stateline deliveries rests upon the San Luis Valley as a whole, it is believed that a division of the obligation as between the Conejos and Rio Grande will better enable the water users to apportion among themselves their relative responsibilities in meeting the total obligations of Colorado.

M.C. HINDERLIDER, RIO GRANDE BASIN COMPACT 23 (1938) [hereinafter HINDERLIDER, RIO GRANDE BASIN COMPACT], *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 5, http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (**DVD Doc. 15**).

Article IV requires "New Mexico to deliver water in the Rio Grande at San Marcial," a gauging station in New Mexico upstream of Elephant Butte Reservoir, for nine months of each year. 53 Stat. at 788.[43] "Article

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[43] In 1948, the Rio Grande Compact Commission adopted a resolution amending the 1938 Compact that changed the location of New Mexico's deliveries – without altering the obligation to deliver water; the resolution abandoned the gauging stations at San Acacia and San Marcial and, instead, required "New Mexico to deliver water in the Rio Grande into Elephant Butte Reservoir" year-round. Rio Grande Compact Comm'n, Tenth Annual Report of the Rio Grande Compact Commission 3 (1948), http://www.

IV sets up the schedules of relationship between the total water supply furnished by the Rio Grande at Otowi, New Mexico, which is located 78 miles south of the Colorado-New Mexico stateline, and that furnished at San Marcial near the upper end of Elephant Butte Reservoir. . . ." HINDERLIDER, RIO GRANDE BASIN COMPACT, at 24. Essentially, New Mexico is required to deliver to the Elephant Butte Reservoir a designated percentage of the water flowing past Otowi.

Article V grants the Rio Grande Compact Commission the right to abandon or create gauging stations with unanimous consent. 53 Stat. at 789; *see also* Hill, *Development of the Rio Grande Compact*, at 184. Article VI creates a system of credits and debits for Colorado and New Mexico, corresponding respectively to over-deliveries and under-deliveries of water. 53 Stat. at 789. Article VI also imposes caps on the debits and credits each State can accrue and requires that each State "retain water in storage at all times to the extent of its accrued debit." *Id.* As "credit water" is that volume of water delivered annually in excess of that required under the 1938 Compact, "credit water" is within the exclusive control of the over-delivering State; however,

> [Article VI] also provides that Colorado or New Mexico may not accumulate annual credits in Elephant Butte reservoir in excess of 150,000 acre-feet of water. This limitation is

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ose.state.nm.us/Compacts/RioGrande/isc_rio_grande_tech_compact_reports.php (selecting 1948 report).

> designed to prevent unsound expansion of development which otherwise might result from accumulations of large annual credits, and which also might reduce the available capacity of that reservoir to regulate the portion of the river flow to which the lands under the Elephant Butte are rightfully entitled.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 24.

Article VII prohibits Colorado and New Mexico from "increas[ing] the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage," unless actual releases from the Rio Grande Project "have aggregated more than an average of 790,000 acre feet per annum." 53 Stat. at 790.

Article VIII provides "that if the usable water in Elephant Butte and Caballo Reservoirs is less than 600,000 acre feet during any January, both Colorado and New Mexico shall release enough debit water from storage reservoirs to maintain at least 600,000 acre feet in the lower reservoirs until the end of April"; but "[t]he amount released by each is limited by the total accrued debit of each." Letter from Raymond A. Hill, Engineering Advisor to the Rio Grande Compact Comm'n, to Julian P. Harrison, Esq., Rio Grande Compact Comm'r for the State of Tex., at 1 (Dec. 8, 1940), *in* Raymond A. Hill Papers, 1890-1945, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 4X190 (**DVD Doc. 16**); *see also* 53 Stat. at 790. As explained by M.C. Hinderlider to Colorado Governor Teller Ammons in 1938:

> This provision is to prevent shortage under the Elephant Butte Reservoir due to the withholding of water which would otherwise have been in storage in that reservoir. The terms of the provisions are such that the release of the water can be made at a rate to protect structures and property along the Conejos and Rio Grande against high stages of flow, and to insure that the releases of reservoir water may be made in such manner as not to encroach upon the stream channel capacity to the detriment of the use of such capacity by Colorado appropriators.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 25 (**DVD Doc. 15**). And Raymond Hill later explained:

> It is apparent . . . that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance by Colorado with the schedules of deliveries set forth in Article III of that Compact and compliance by New Mexico with the schedules set forth in Article IV would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 acre-feet per year from Project Storage for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico. It is also clear that the restrictive provisions [of Article VIII] were designed to protect Colorado and New Mexico from the adverse effects of releases

> from Project Storage at any greater average annual rate.

Hill, *Development of the Rio Grande Compact*, at 183-84. Article VIII, therefore, shielded Colorado and New Mexico from bearing responsibility for any unauthorized diversions by Mexico downstream of Elephant Butte, which had been a major source of contention for New Mexico.

Article IX of the 1938 Compact, which allows for future works on the San Juan River to divert water into the Rio Grande, *see* 53 Stat. at 790, "is a recognition of the right of the U.S. Government or New Mexico to make importations of water into the Upper Rio Grande Basin under conditions that will insure the protection of vested rights, present and future uses of water, and full development in the San Juan Basin in Colorado." HINDERLIDER, RIO GRANDE BASIN COMPACT, at 25. Article X states that, should water from another drainage basin be introduced pursuant to Article IX into the Rio Grande Basin by the United States or Colorado or New Mexico, individually or jointly, then "the State having the right to the use of such water shall be given proper credit therefor in the application of the [delivery] schedules." 53 Stat. 790.

Article XI protects the character and quality – not the quantity – of the water in the Rio Grande flowing downstream and allows a signatory State to bring an action related to such in the Supreme Court if that State decides a negative change in the quality of the

waters has occurred. *Id.* at 790-91. M.C. Hinderlider elaborated on the inclusion of Article XI:

> Article XI is a most important declaration of principle with respect to the responsibility of an upper state, or citizen thereof, for the quality or character of the water flowing from an upper state into another state, and is designed for the protection of the interests of the upper state and its water users.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26. And, as explained by Frank B. Clayton, when asked whether the 1938 Compact addressed the quality of the water passing downstream:

> That question was a very sore spot, and almost prevented the consummation of the compact. One of the principal issues in the suit with New Mexico was the impairment on her part of the quality of the water by development of the Middle Rio Grande Conservancy District and for that reason [Texas was] not getting the equivalent of what we were entitled to in undiluted, unimpaired water. That point was discussed at great length in the negotiations for the compact. We tried to get a definite agreement from Colorado and New Mexico that if the quality of the water was impaired beyond a certain grade or point, defining it in terms of total dissolved salts, instead of in terms of general quality, then the amount would be increased according to the proportions worked out by the engineers. We could not agree on that point. There has never been any determination by the courts of the legal

> effects of changing the quality of water by irrigation, as far as the rights of users below are concerned. We did insert in the compact a provision substantially to the effect that the compact was without prejudice to the rights of Texas, or of any of the signatory States, to invoke the jurisdiction of a court of competent jurisdiction in the event the quality of the water is impaired. That provision is Article XI of the Compact. . . .
>
> That, gentlemen, was a compromise between opposing views. They took the position that they were not in law responsible. We took the contrary position, not only in the negotiations for the compact but in the lawsuit. But we could not reach any definite agreement as to the legal effect nor as to the relation between salinity and amount. Consequently, we left that point open, to be determined by litigation in the event the quality should be impaired in the future to our detriment.

May 1938 Lower Rio Grande Users Meeting Proceedings, at 11. (**DVD Doc. 14**).[44]

[44] And according to Raymond Hill:

> Impairment of the quality of the waters of the Rio Grande reaching Elephant Butte Reservoir was one of the causes of the action brought by Texas against New Mexico in the Supreme Court of the United States in October 1935. Trial of this action was suspended in March 1937 by the Special Master, leaving this allegation undecided. The intent of Article XI was to terminate this controversy, but with the proviso that:

Article XII establishes the construct for the administration of the Compact by the Rio Grande Compact Commission. 53 Stat. at 791. According to M.C. Hinderlider,

> [t]he conception of the Commissioners and their advisors was that there should be as little interference as possible with the control by the duly accredited state authorities, and the present uses of water in each state, by the joint Commission for the administration of the Compact. While it was recognized that the provisions of the Compact are not self-executing, and hence require some administration aside from the collection of hydrographic data, et cetera, it will be noted that any action taken by the Commission must be unanimous. This is designed to protect the

> Nothing herein shall be interpreted to prevent recourse by a signatory State to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter, by one signatory State to the injury of another. Nothing herein shall be construed as an admission by any signatory State that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

Hill, *Development of the Rio Grande Compact of 1938*, at 185. Nothing in the 1938 Compact or in the negotiation history suggests that the Commission intended to limit future Compact disputes solely to water-quality issues.

> rights of any one state against concerted action by a mere majority of the members of the Commission.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26. But Article XII also limits the jurisdiction of the Commission "only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact"; further, "[t]he findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce [the 1938] Compact." 53 Stat. at 791.

Article XIII of the 1938 Compact "provides that the Compact Commission shall meet at the request of any member of the Commission at the expiration of every five-year period after the effective date of the Compact to review any provisions which are not substantive in character and do not affect the basic principles upon which the Compact is founded." Hill, *Development of the Rio Grande Compact*, at 185; *see also* 53 Stat. at 791.

Article XIV states that "[t]he schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of increases of diminution in the delivery or loss of water to Mexico." 53 Stat. at 792. As explained by Raymond A. Hill:

> There were repeated and sometimes acrimonious arguments among the Commissioners and their Advisers during the negotiations of [the] Rio Grande Compact with respect to diversions of water for use in Mexico in excess of the 60,000 acre-feet per year allocated to Mexico under the Treaty of 1906. Colorado and New Mexico demanded that such diversions be kept down to the amount prescribed by the Treaty and that each of them share in any such reduction in diversions by Mexico. Texas, on the other hand, asserted that it had no control over such diversions and could not be responsible for them. Article XIV . . . was thus a compromise.

Hill, *Development of the Rio Grande Compact*, at 185-86. Therefore, according to M.C. Hinderlider:

> Article XIV is designed to protect Colorado and New Mexico against any increases in future uses of water by Mexico over and above the 60,000 acre-feet recognized by treaty [and] any decrease in uses of water by Mexico would be to the benefit of the water users under the Elephant Butte Reservoir.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26.

Article XV recognizes that the 1938 Compact is based solely upon conditions peculiar to the Rio Grande Basin; for that reason, it would not serve to "establish[] any general principle or precedent applicable to other interstate streams." 53 Stat. at 792. "This provision, taken from the 1929 [Interim] Compact, was universally desired because each of the three

States was involved in the allocation of water in other interstate streams." Hill, *Development of the Rio Grande Compact*, at 186. "Article XVI, also taken from the 1929 Compact, was incorporated to meet the requirments [sic] of the United States." *Id.* Article XVI states: "Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes." 53 Stat. at 792.

Lastly, Article XVII states that the 1938 Compact "shall become effective when ratified by each of the signatory States and consented to by the Congress of the United States." *Id.*

4. Ratification of the 1938 Compact proves difficult

The negotiation and drafting of the 1938 Compact took years, but even after the Commissioners of the Rio Grande Compact Commission signed the compact, ratification by the legislatures of the three States proved difficult. Interests in both New Mexico and Colorado threatened to block ratification in their respective legislatures if Texas did not support applications for federally constructed reservoir projects in those states – projects that could impair the volume of water received downstream by Texas without a ratified Compact in place to protect Texas's rights. *See, e.g.*, Letter from Frank B. Clayton, Rio Grande Compact Comm'r for

Texas, to Judge Edwin Mechem, counsel for the Elephant Butte Irrigation District (Aug. 12, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("[M]y good friend [H.C.] Neuff[er] [Chief Engineer for the Middle Rio Grande Conservancy] . . . threatens that Albuquerque will upset the apple-cart and defeat ratification if we don't clear her project.") (**DVD Doc. 17**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Maj. Richard F. Burges, Counsel for El Paso County Water Improvement Dist. No. 1, at 1 (Aug. 30, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("To each of these requests [to support federal funding for Colorado and New Mexico projects] I have replied that until the Compact has been ratified by the three state legislatures and approved by the Congress, it is actually not a compact and affords us no protection . . . all those gentlemen threaten to defeat ratification in their legislatures if they are prevented from getting federal funds at this time on account of [Texas's] failure to clear the projects. . . . Carr stated most emphatically that he was going to do all in his power to defeat ratification if clearance was not given to the Colorado projects.") (**DVD Doc. 18**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Hon. Oscar C. Dancy 1 (Sept. 20, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("[I]f [Colorado and New Mexico] don't get [federal

funding for their projects], they threaten to defeat ratification in their own legislatures, a contingency [Texas] wishes to avoid if possible. The truth of the matter is that the chief reason Colorado and New Mexico agreed to the terms of the Compact was that they could build these improvements with government money, and if they don't get this money their interest in ratification [of the 1938 Compact] is materially lessened.") (**DVD Doc. 19**).[45]

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[45] In an effort to appease Colorado and New Mexico, as well as obtain protections for Texas prior to the ratification of the 1938 Compact by the States and Congress, the Texas Attorney General's Office proposed to the Attorneys General for Colorado and New Mexico terms for a consent decree in the pending, yet stayed, lawsuit involving Texas and New Mexico:

> It is not the desire of this Department, nor of the Commissioner for Texas, to defeat Colorado and New Mexico in their applications, except on grounds which we believe to be of compelling importance. We have given a good deal of thought and study to this situation and think that we have arrived at a solution which should be satisfactory to all three States.
>
> There is pending in the Supreme Court of the United States a law suit between Texas and New Mexico over the waters of the Rio Grande. Final hearings in this law suit were held in abeyance pending negotiations for a permanent compact, which it was hoped would resolve the differences between the two States. The final disposition of this law suit is in the hands of the Attorneys General of the two States, of course, quite independent of the compact, and we believe it is entirely feasible for the two States, through their counsel, to dispose of the law suit by the entry of an agreed decree embodying the provisions of the compact even prior to its ratification by the Legislature. If Colorado should intervene in this law suit, and likewise enter into such an agreed

Within Texas, irrigators in the Lower Rio Grande Valley threatened to lobby their legislators to defeat ratification of the 1938 Compact in Texas if an intrastate agreement could not be reached allowing a certain volume of water to be distributed to water users downstream of Fort Quitman to Brownsville, Texas.

> decree, the same result could be reached as by final ratification of the compact by the three State Legislatures and the approval of Congress. This, it is thought, can be done with very little delay, and if it is done the objections by the Rio Grande Compact Commissioner of Texas to the proposed projects will be withdrawn and doubtless Federal funds can be secured within the time limit which we understand has been set by the Federal authorities for the allocation of Federal funds.

Letter from H. Grady Chandler, First Assistant Att'y Gen. of Texas, to Frank H. Patton, Att'y Gen. of New Mexico, and Byron G. Rogers, Att'y Gen. of Colorado 2 (Sept. 8, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 20**).

But the proposal for the consent decree became moot after New Mexico voluntarily withdrew its request for federal funding of its project, deciding to obtain their water supply elsewhere in the state; "[h]ence, there [was] no longer any necessity for haste" in consummating a deal with Texas to put into effect the protections outlined in the 1938 Compact. Letter from Frank B. Clayton, Rio Grande Compact Comm'r from Texas, to Dr. Harlan H. Barrows, National Resources Committee 3 (Oct. 1, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 21**). Colorado's project had also been disapproved by the Public Works Administration. *See* Letter from Dr. Harlan H. Barrows, Nat'l Res. Comm., to Frank B. Clayton, Rio Grande Compact Comm'r from Texas (Sept. 29, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 22**).

See, e.g., 1938 Lower Rio Grande Users' Meeting Proceedings, at 12-13 (**DVD Doc. 14**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Hon. Homer L. Leonard 2 (Aug. 3, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Aug. 3 Clayton Letter] ("[T]here seemed to me to be an indication that if [Lower Rio Grande water users'] claims were not conceded by the upper [water] districts, the lower water users would oppose ratification.") (**DVD Doc. 23**).

Lower Rio Grande water users were convinced that their interests had not been taken into account when the Rio Grande Compact Commission allocated Rio Grande waters to each State under the 1938 Compact:

> Of course I know this: I know we are interested in getting our proportionate share of the water, the share to which we are entitled. Under the compact between the States of Texas, Colorado and New Mexico, none of the diversions below Fort Quitman have been taken into consideration. . . . I understand that under the ruling of the Supreme Court laid down in the la Plata [sic] case, each State is entitled to its proportionate part of the water, that is to an equitable apportionment. . . . In view of the fact that the users below Fort Quitman haven't been taken into consideration, we rather feel that in justice to them some provision should be made for a certain diversion for the lower users of this Rio Grande water.

1938 Lower Rio Grande Users' Meeting Proceedings, at 5 (statement of Judge Ben E. King, attorney for the Maverick County Water Control and Improvement District No. 1) (**DVD Doc. 14**). Indeed, Lower Rio Grande water users, reading the 1938 Compact for the first time without the benefit of knowledge of the long history of the dispute and of the Rio Grande Project, the scientific data forming the foundation for the compact, and the negotiating history leading to the final compact, wondered if the Rio Grande Compact Commissioner from Texas had bargained for the best deal that he could have obtained. *See id.* at 15-16.[46]

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[46] The Lower Rio Grande water users were not even aware that the authority of the Rio Grande Compact Commission was limited to apportionment of the waters above Fort Quitman and the reasons for that limitation. As explained to Lower Rio Grande water users in May 1938 by Frank B. Clayton, Rio Grande Compact Commissioner from Texas, with assistance from Dr. Harlan H. Barrows of the National Resources Committee and Mr. Roland Harwell, Manager of the El Paso County Water Improvement District No. 1, the problem of apportionment of Rio Grande waters dated back to the turn of the twentieth century and the claims of Mexico to the waters near El Paso and Juarez. *See* 1938 Lower Rio Grande Users' Meeting Proceedings, at 15-16. As noted by Harwell:

> Then when the United States and Mexico got off together to settle their differences, they settled on that portion of the river along which there were difficulties and didn't include any other part, because there were no difficulties. . . .
>
> In those days the river petered out at Fort Quitman or above completely, and nobody could feel certain that there would be any water in the stream down there during the summer, unless water flowed in from other

Over the course of several conversations with various Lower Rio Grande water users and their counsel, Frank B. Clayton, Rio Grande Compact Commissioner for Texas, and others, attempted to educate those water users as to two realities: (1) the geography of Southern Texas and (2) the preemptive nature of the Rio Grande Project as operated by Reclamation. First,

> as a practical matter, when we talk about deliveries of water to Texas, we are speaking of deliveries into the reservoir at Elephant Butte, because below Elephant Butte there are no tributaries to speak of, and, except in times of flood, the flow is not augmented in any considerable measure until after the water passes Fort Quitman.
>
> . . . .
>
> [T]he lands above Fort Quitman receive their entire water supply from the Rio Grande and its tributaries in Colorado and New Mexico. The lands below Fort Quitman, except those immediately below, receive by far the greater part of their supply from tributaries flowing in below that point in Texas and Mexico.

See id. at 10, 15 (statements of Frank B. Clayton); *see also* Aug. 3 Clayton Letter, at 4 ("[B]ecause of the small quantity [of water] that can actually, physically be

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> sources prior to 1906. So, I think the river just naturally got divided into two sections; they tried to solve the problem up above; there was no problem to solve down below. Not then.

Id. at 16.

passed and the very poor quality of the water, the amount which you could beneficially use twelve hundred miles below us would be infintesimal [sic]. . . .") (**DVD Doc. 23**). And as to the water entering the Rio Grande via tributaries below Fort Quitman, appropriators on both sides of the U.S.-Mexico border diverted it at will to irrigate their lands. May 1938 Lower Rio Grande Users' Meeting Proceedings, at 17-18 (**DVD Doc. 14**).

Second, Clayton explained that "for the benefit of the lands above Fort Quitman, [Reclamation had appropriated] all [of] the unappropriated waters in New Mexico[;] Elephant Butte dam was constructed, and is being paid for by farmers within the Rio Grande Project." *Id.* at 10. Roland Harwell, Manager of the El Paso County Water Improvement District No. 1, explained the limits of the Rio Grande Project:

> [O]ur project ends at the end of the Tornillo district, a point down below Fabens a relatively short distance. The last diversion which we contemplate making here will be at Ysleta, twelve miles below El Paso. Our control over the water still will end at Fabens, in part, and at the head of the Tornillo main canal, at the end of the Tornillo district. . . . What happens beyond that point, and Fort Quitman is well beyond that point, is something wholly without our control as it is without your control.

Id. at 16. Because of diversions of tributary water occurring immediately below the last delivery of water

by the Rio Grande Project, Reclamation could not guarantee a delivery of 200,000 acre-feet of water at Fort Quitman, even if it were so inclined, as requested by the Lower Rio Grande water users. *Id.* at 16-17. As succinctly put to the Lower Rio Grande water users by Harwell: "[Y]ou need storage; and you need a treaty [with Mexico]. . . ." *Id.* at 17; *see also* Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Gov. W. Lee O'Daniel 4 (Nov. 16, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter 1938 Gov. O'Daniel Letter] ("[Indeed], it has been only in very recent years that the lower Rio Grande valley has suffered from lack of water, and these dry seasons have alternated with seasons of destructive floods, the waters of which, if impounded, would afford a dependable and ample supply.") (**DVD Doc. 24**). And, as simplified further by Dr. Harlan Barrows of the National Resources Committee: "No compact, no treaty; no treaty, no storage dams; no dams, no regulation of the waters of the lower river." May 1938 Lower Rio Grande Users' Meeting Proceedings, at 21 (**DVD Doc. 14**).

While the Lower Rio Grande water users contemplated their options, one attorney investigated the negotiations of the Rio Grande Compact Commission. Sawnie B. Smith, an attorney representing the Water Conservation Association of the Lower Rio Grande Valley, wrote to Frank Clayton, Rio Grande Compact Commissioner from Texas, to ask for clarification on the

1938 Compact's terms regarding the water allocation to Texas:

> There has been considerable comment on the fact that the Rio Grande Compact between Colorado, New Mexico and Texas, dated March 18, 1938, makes no provision for the division of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled.
>
> I understand that theoretically, if not in fact, the total amount of water in the project storage provided for in the compact is used or needed by the Rio Grande project except the portion thereof required to be delivered to Mexico. I also understand that the Rio Grande project is an established, defined area lying about 60% in New Mexico and about 40% in Texas. Therefore, if these understandings are correct, and the present usage and physical conditions remain the same, the division of the waters as between Texas and New Mexico would be in the proportions of the Rio Grande project area in said two States.
>
> I do not find anything in the compact, however, which ties down and limits the use or division of the waters according to present usage and physical conditions, and nothing that would prevent controversy between the two States in the future regarding the division of the waters between the two States.
>
> This omission is too obvious to have been inadvertent, and, therefore, unquestionably,

> the Commissioners had what they considered valid reason for it. On behalf of a number of interested parties in this area, I would appreciate it very much if you would advise me why the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms.

Letter from Sawnie B. Smith, Esq., to Frank B. Clayton, Rio Grande Compact Comm'r (Sept. 29, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Sept. 1938 Sawnie Smith Letter] (**DVD Doc. 25**).

In response, Clayton explained:

> The question of where the point of division of the waters of the Rio Grande as between Texas and New Mexico should be fixed has been the subject of a great deal of study ever since the original Rio Grande Compact Act was passed, in 1928. It was decided prior to the signing of the temporary compact that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir, and this provision was inserted in the temporary compact. The reasons for it are numerous. In fact, the obstacles in the way of providing for any fixed flow at the Texas line were considered insuperable.
>
> The Rio Grande Project, as you know, is operated as an administrative unit by the

Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time. Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent government agency.

Moreover, measurements of the waters passing the Texas state line would be very difficult and expensive, if not impossible. This, for the reason that irrigation canals, ditches and laterals cross the line, which is of a very irregular contour, at many different points, carrying water in addition to what is carried in the river, itself, and it would require continual measurements in these various channels to make any reasonably accurate computations of the total flow.

However, the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the

> Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent. [sic] for each figure.
>
> I apprehend that there will never be any difficulty about the allocation of this water.
>
> The arrangement just mentioned is of course a private one between the districts involved, and for that reason it was felt neither necessary or desirable that it be incorporated in the terms of the Compact.
>
> The lands above Fort Quitman and below the Rio Grande Project eastern boundary receive only "tail-end" or waste water, the lands in the Hudspeth County district taking its water by virtue of a contract and the lands privately owned below the district lower boundary only by taking by gravity or pumps what happens to be in the river channel.
>
> The deliveries to Mexico are of course governed by treaty.

Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sawnie B. Smith, Esq. 1-2 (Oct. 4, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Oct. 1938 Frank Clayton Letter] (**DVD Doc. 26**).

After many conversations with and among Lower Rio Grande water users over several months,[47] "the governing board of the Water Conservation Association of the Lower Rio Grande Valley . . . adopted a resolution endorsing ratification of the [1938] Compact." Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sen. H.L. Winfield of Texas 1 (Feb. 7, 1939), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 27**).[48] At that point, the legislatures of the signatory States ratified the compact. *See* Act of Feb. 21, 1939, ch. 146, 1939 Colo. Sess. Laws 489; Act of Mar. 1, 1939, ch. 33,

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[47] *See, e.g.*, Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sen. H.L. Winfield of Texas 1 (Feb. 7, 1939), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (recounting Clayton "spen[ding] a week last fall [near Brownsville, Texas], talking with various leaders in the valley – directors, managers, and attorneys of the irrigation districts, and other men of prominence in the towns between Mission and Brownsville") (**DVD Doc. 27**); 1938 Gov. O'Daniel Letter, at 5 (recounting meetings in the Lower Rio Grande Valley, "meeting with representatives of the various interests, and we discussed with each other freely and frankly all the ramifications of the compact and the possible solution of our mutual problems") (**DVD Doc. 24**).

[48] In 1944, the United States and Mexico ratified a treaty allocating the waters of the Colorado and Tijuana rivers, as well as the Rio Grande river from Fort Quitman, Texas, downstream to the Gulf of Mexico. Treaty Between the United States of America and the United Mexican States Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219.

1939 N.M. Laws 59; Act of Mar. 1, 1939, ch. 3, 1939 Tex. Gen. Laws 531. The 1938 Compact became federal law in May 1939. *See* Act of May 31, 1939, ch. 155, 53 Stat. 785.

Raymond A. Hill, former engineering assistant for Reclamation and Texas's engineering advisor to the Commission, recounted in the late 1960s:

> The Rio Grande Compact of 1938 has been condemned by some as being unduly complicated, poorly written, and of uncertain intent. If read, however, in the light of the history of irrigation developments along the Rio Grande in Colorado, New Mexico, and Texas and with appreciation of the antagonisms among these States and between segments of them at the time of negotiation of that Compact, its apparent complications are reconciled, the language is clarified, and the intent of the negotiators becomes evident.
>
> Long before 1938, it had become obvious that the quantities of water obtainable for the Rio Grande were not sufficient to satisfy the demands on this supply for irrigation of all of the areas under canal systems in Colorado, New Mexico, and Texas. Elephant Butte Dam was built by the Federal Government to capture flood waters and thereby relieve the acute shortages in supply below that point that had been caused by expansion of irrigation agriculture in Colorado. In addition, an embargo was placed on further developments in Colorado.

Water resource developments in New Mexico above Elephant Butte were dormant during this period of expansion in Colorado. In 1926, however, a study was undertaken by the Federal Government, in cooperation with local interests, which had as its objective rehabilitation of the Middle Rio Grande Valley by construction of storage works, new canal systems, and drainage of the valley lands.

The reaction of Colorado to this program was adverse because of the resentment of the embargo on new developments in Colorado. The reaction among the water users in Texas and in New Mexico below Elephant Butte was also adverse because they feared that any expansion of use upstream would impair their water supply. It was in this atmosphere that the Rio Grande Compact of 1929 was negotiated.

The Middle Rio Grande Project was constructed soon thereafter, unfortunately just as a drought began and the natural flow of Rio Grande became insufficient to maintain an ample supply of water in Elephant Butte Reservoir. The condition brought about, in 1935, the action of the Supreme Court of the United States of *Texas v. New Mexico*. This action intensified the antagonism that had long existed between water users in the Rio Grande Federal Reclamation Project and those in the Middle Rio Grande Project.

Colorado had insisted on the inclusion in the 1929 Compact of provisions intended to

result in the construction of the Closed Basin Drain by the Federal Government. If this drain had been built, Colorado would have been entitled to expand its consumptive use of water by the quantity so salvaged. This drain was not built, nor were any other works built in place of it. Colorado thus entered the negotiations of the 1938 Compact with the feeling that it had been treated unfairly by the representatives of New Mexico and Texas.

The Rio Grande Compact Commissioners, during their meetings in 1937 and 1938, thus had to divide an insufficient supply among three groups of water users, each of which was antagonistic to the other two. Their solution was to hold to the principles of the 1929 Compact and to depart as little as practicable from its provisions.

The Committee of Engineering Advisers was instructed to prepare schedules of deliveries by Colorado and by New Mexico that would insure maintenance of the relationships of stream inflow to stream outflow that had prevailed under the conditions existent when the Compact of 1929 was executed. The Committee of Engineering Advisers was also instructed to provide for freedom of development of all water resources in the drainage basin of Rio Grande above Elephant Butte subject only to compliance with these schedules. Both tasks were accomplished, but only after much time and effort and argument as to the wording of each phrase in their reports to the Commission.

> The Committee of Legal Advisors, who prepared the draft of the 1938 Compact, used the language of the 1929 Compact where possible. They also adopted almost verbatim the wording of the reports of the Engineering Advisers to avoid renewal of controversies that had been resolved.
>
> The Rio Grande Compact of 1938 should thus be looked upon as an expansion of the Compact of 1929, designed to provide for the maximum beneficial use of water in the basin of Rio Grande above Fort Quitman without impairment of any supplies beneficially used under the conditions prevailing in 1929.

Hill, *Development of the Rio Grande Compact of 1938*, at 197-98.

IV. New Mexico's Motion to Dismiss Texas's Complaint

The Supreme Court granted leave to Texas on January 27, 2014, to file its Complaint. *See* 134 S. Ct. 1050 (2014). In its Complaint, Texas alleges that various actions of New Mexico violate the 1938 Compact, thereby depriving Texas of its equitable apportionment of water to which it is entitled pursuant to the 1938 Compact. *See* Compl. ¶ 18. Specifically, Texas alleges that New Mexico, through the actions of its officers, agents, and political subdivisions, has violated the 1938 Compact by allowing the diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of the Elephant

Butte Reservoir, thereby diminishing the amount of water that flows into Texas via the administration of Rio Grande Project by tens of thousands of acre-feet. *Id.* ¶¶ 18-19. Texas seeks: (i) declaratory relief as to its rights to the waters of the Rio Grande pursuant to the 1938 Compact; (ii) an order compelling New Mexico to "deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act" and enjoining New Mexico from interfering with or usurping the United States' authority to operate the Rio Grande Project; and (iii) an order awarding damages including pre- and post-judgment interest for injuries suffered by Texas as a result of New Mexico's actions. *Id.* at 15-16.

New Mexico moves to dismiss Texas's Complaint for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has "allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. to Dismiss at 28 (quoting Compl. ¶ 4). Indeed, New Mexico argues that its *only* duty under the 1938 Compact is to deliver water to Elephant Butte Reservoir. *See id.* at 59, 61 ("New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the

United States alleges that New Mexico breached that duty. . . . In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte."). New Mexico, therefore, argues that it has no duty under the 1938 Compact "to limit post-1938 development below Elephant Butte" within its boundaries. *Id.* at 45. New Mexico further asserts that New Mexico state law – not the 1938 Compact – governs the distribution of water released from Elephant Butte Reservoir within New Mexico state boundaries. *See* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act.").

Texas filed a brief in opposition to New Mexico's motion to dismiss. Texas argues not that New Mexico has a state line delivery obligation under the Compact of 1938, but rather that the Compact imposes upon New Mexico an obligation

> to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to intercept, deplete or otherwise interfere with water released by the Rio Grande Project

> for the benefit of Rio Grande Project lands in Texas.

Texas Opp. Mot. to Dismiss at 22. Texas maintains that New Mexico's obligation to deliver the water *is* an obligation to relinquish control of it and that New Mexico's delivery obligation "would be meaningless if New Mexico could simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas." *Id.* at 28. According to Texas, New Mexico's reading of the Compact of 1938 would ignore other provisions of the Compact, such as Article IV's fixed delivery schedules, Article VI's Accrued Debit provision, and Article VII's storage limitations, *id.* at 32-33, and likewise would ignore the role of federal reclamation law requiring users of water from federal reclamation projects to have contracts with the United States. *Id.* at 41-45. Texas also argues that, having the force of federal law, the Compact, and not New Mexico state law, "controls how water is apportioned to Texas." *Id.* at 58.

The United States also filed a brief in opposition to New Mexico's motion to dismiss. Four *amici curiae* filed briefs as well: the City of Las Cruces, New Mexico filed its brief in support of the motion to dismiss, while the City of El Paso, Texas, the Hudspeth County Conservation and Reclamation District No. 1, and the El Paso County Water Improvement District No. 1 filed briefs in opposition to the motion to dismiss. New Mexico submitted a Reply Brief on July 1, 2014. Counsel for parties New Mexico, Colorado, Texas, and the

United States, as well as *amici curiae* City of Las Cruces, City of El Paso, Texas, and El Paso County Water Improvement District No. 1 presented oral argument[49] at a hearing to consider the motion to dismiss held in New Orleans, Louisiana, on August 19, 2015.

Based upon the standard of review for motions filed in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the pleadings filed by the parties and the *amici curiae*, and the oral arguments advanced by those parties, I recommend that the Court deny New Mexico's motion to dismiss Texas's Complaint.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides guidance in ruling on New Mexico's motion to dismiss. Under Rule 12(b)(6), all factual allegations contained in Texas's Complaint and the United States' Complaint in Intervention are assumed to be true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (stating that a complaint should be liberally construed in favor of the non-movant). "To survive a motion to dismiss, a complaint must contain sufficient

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[49] *Amici curiae* City of Las Cruces, City of El Paso, Texas, and El Paso County Water Improvement District No. 1 filed motions pursuant to Supreme Court Rule 28.7 to participate in oral argument on the motion to dismiss. *See* SM R. Docs. 13, 18, 30. Those motions were granted on July 14, 2015. *See* Modified Case Mgmt. Order No. 4 (SM R. Doc. 32).

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

Here, the States of Colorado, New Mexico, and Texas negotiated and ratified the 1938 Compact, which equitably apportioned all of the waters of the Rio Grande above Fort Quitman among those States; Congress subsequently approved the 1938 Compact. "Congressional consent transforms an interstate compact . . . into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). In interpreting federal statutes, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

But it is also appropriate to "look[] to legislative history and other extrinsic material when required to interpret a statute which is ambiguous." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (internal citations omitted). The Supreme Court has examined "evidence regarding the negotiating history of other interstate compacts." *Id.* (citing *Texas v. New Mexico*, 462 U.S. 554, 568 n.14 (1983); *Arizona v. California*, 292 U.S. 341, 359-60 (1934)). "Thus, resort to extrinsic

evidence of the compact negotiations . . . is entirely appropriate" here if the 1938 Compact language is ambiguous. *Oklahoma*, 501 U.S. at 235. Further, "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country. . . ." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (interpreting federal statute in light of its "text, structure, purpose, and history")).

And a congressionally approved compact is a contract as well as a statute; therefore, "[i]nterstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). A compact's express terms are "the best indication of the intent of the parties." *Id.* (citing *Montana v. Wyoming*, 131 S. Ct. 1765, 1771-72 & n.4 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1979)).

As stated before, and consistent with *Arizona v. California*, 373 U.S. 546, 552 (1963), this report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report.

B. Texas Has Stated a Claim Under the Unambiguous Text and Structure of the 1938 Compact

The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785.[50] An examination of the plain text and structure of the 1938 Compact reveals that the signatory States intended

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[50] Due to the history of inconsistency and insufficiency of Rio Grande waters annually available for irrigation, there seems to be no question that the 1938 Compact apportioned *all* of the water of the Rio Grande above Fort Quitman among Colorado, New Mexico, and Texas, reserving none. As stated by Raymond A. Hill, engineer advisor to the Rio Grande Compact Commission from Texas:

> Long before 1938, it had become obvious that the quantities of water obtainable for the Rio Grande were *not sufficient* to satisfy the demands on this supply for irrigation of all of the areas under canal systems in Colorado, New Mexico, and Texas. Elephant Butte Dam was built by the Federal Government to capture flood waters and thereby relieve the acute shortages in supply below that point that had been caused by expansion of irrigation agriculture in Colorado. . . .
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> . . . .
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> The Rio Grande Compact of 1938 should . . . be looked upon as an expansion of the Compact of 1929, designed to provide for the *maximum* beneficial use of water in the basin of Rio Grande above Fort Quitman without impairment of any supplies beneficially used under the conditions prevailing in 1929.

Hill, *Development of the Rio Grande Compact*, at 197-98 (emphasis added).

the Rio Grande Project to be the sole vehicle by which Texas and lower New Mexico would receive their equitable apportionments of the Rio Grande waters. Starting with the definitions found in Article I and including all of the articles creating the detailed system of accountability to ensure each State received its equitable share of water, the Rio Grande Project, referred to in the 1938 Compact as the "Project," is wholly incorporated throughout the 1938 Compact, which imposes rights and duties on each of the signatory States in that context.

1. The text of the 1938 Compact requires New Mexico to relinquish control of Project water permanently once it delivers water to the Elephant Butte Reservoir

Article II of the Compact requires the Rio Grande Compact Commission to maintain and operate a series of gauging stations at regular intervals along the main stem of the Rio Grande to "secur[e] records required for the carrying out of the Compact," *id.* at 786, and, according to delivery schedules identified in the 1938 Compact that are based upon those records, Colorado and New Mexico are required to "deliver" water at certain points along the Rio Grande, after each has taken its equitable share of the waters of the stream, *see id.* at 787-88 (containing Articles III and IV). Article III of the 1938 Compact requires Colorado "to *deliver* water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar

year. . . ." *Id.* at 787 (emphasis added). Article IV of the 1938 Compact requires New Mexico "to *deliver* water in the Rio Grande at San Marcial, during each calendar year. . . ." *Id.* at 788 (emphasis added).[51]

The word "deliver," according to contemporary authority, is defined as follows: "To deliver property to another means to surrender it to that person. To give with one hand and to take back with the other is no delivery." BALLENTINE'S LAW DICTIONARY 353 (1930); *see also* BLACK'S LAW DICTIONARY 349, 842 (2d ed. 1910) (defining "delivery" in the context of conveyancing as "[t]he final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such a manner that it cannot be recalled by the grantee"). Similarly, in general contemporary usage, "deliver" is defined as "[t]o give or transfer; to yield possession or control of; to part with (to); to make or hand over . . . to commit; to surrender." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 963 (1934).

Articles III and IV of the 1938 Compact identify the delivery of water by Colorado and New Mexico to be an "obligation," 53 Stat. at 787-88, which is "a legal duty by which a person is bound to do or not to do a certain thing," BLACK'S LAW DICTIONARY 842 (2nd ed.

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[51] New Mexico's point of delivery was later changed to Elephant Butte Reservoir in 1948 by a unanimous decision of the Rio Grande Compact Commission because river conditions at San Marcial made gauge maintenance impossible. *See* Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

1910). The 1938 Compact pairs that "obligation . . . to deliver water" with the mandatory term "shall" to connect the duty to relinquish control with certain volumes of water identified in the delivery schedules, *i.e.*: "The *obligation* of New Mexico to *deliver* water in the Rio Grande at San Marcial . . . *shall* be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station." 53 Stat. at 788 (emphasis added).

Thus, the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir. If, as Texas alleges, New Mexico intercepts or diverts water it delivers to the Rio Grande Project immediately upon release from Elephant Butte Reservoir, it disregards the text of Article IV and renders the common and straightforward meanings of the terms "obligation" and "deliver" in Article IV void, which offends the principles of federal statutory construction as well as those of contractual interpretation.

New Mexico maintains that "Texas appears to argue that the Compact includes an implied covenant prohibiting New Mexico from 'allow[ing] and authoriz[ing]' downstream diversions after New Mexico has performed its duty to deliver the water at Elephant Butte Reservoir" and that any such implied covenant cannot be read into an interstate compact. Mot. to Dismiss at 36. However, New Mexico's duties to relinquish control of the water at Elephant Butte and to refrain from post-Compact depletions of water below Elephant Butte do not arise from any implied covenant

or implied term, but from the very meaning of the text of the Compact.

2. The structure of the 1938 Compact integrates the Rio Grande Project wholly and completely, thereby protecting both deliveries to and releases from Elephant Butte Reservoir

Once New Mexico delivers water to Elephant Butte Reservoir/Rio Grande Project, that water becomes "Usable Water," which is defined by the 1938 Compact in Article I(*l*) as "all water, exclusive of credit water,[52] which is in *project storage* and which is available for release in accordance with *irrigation demands*, including deliveries to Mexico." *Id.* at 786 (emphasis added). During oral argument, New Mexico confirmed the common understanding that the "irrigation demands" as identified in the definition of "Usable Water" refer to the acres in both Texas and lower New Mexico that are irrigated via the administration of the Rio Grande Project. *See* Hr'g Tr. 34:23-35:12, Aug. 19, 2015.

The term "Project Storage" as used in the definition of "Usable Water" is defined in Article I(k) in the 1938 Compact as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant

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[52] "Credit Water" is defined by the 1938 Compact in Article I(m) as "that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both." 53 Stat. 786.

Butte and above the first diversion to the lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet." 53 Stat. at 786. Article VI requires that "all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits [shall] be computed for that year." *Id.* at 789. This annual computation would reflect whether either Colorado or New Mexico failed to deliver the full volume of its required deliveries pursuant to the detailed schedules in Articles III and IV of the 1938 Compact, or if either delivered water in excess of its required deliveries. Colorado is generally limited by the 1938 Compact to 100,000 annual and accrued debits, and New Mexico is limited, with exceptions, to 200,000 accrued debits; both States must "retain water in storage at all times to the extent of its accrued debit." *Id.*

Article VII of the 1938 Compact prohibits Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of "Usable Water" in "Project Storage," subject to two exceptions: when Reclamation has released from Project Storage a volume of water that is, on average, greater than 790,000 acre feet per year, or when Colorado or New Mexico elects to relinquish available Accrued Credits. *Id.* at 790. Article VII thus protects Colorado and New Mexico should Reclamation release too much water from Elephant Butte Reservoir; but it also protects access to Rio Grande flood waters by New Mexico below

Elephant Butte and by Texas.[53] In fact, Article VIII allows Texas to demand during the first month of each calendar year that Colorado and New Mexico – and New Mexico can demand that Colorado – release water from storage reservoirs constructed in upstream States after 1929 up to the amount of upstream States' Accrued Debits sufficient to maintain the volume of water in "Project Storage" to 600,000 acre feet during the first quarter of the year, "to the end that a normal release of 790,000 acre feet may be made from project storage in that year" to irrigate lands in Texas, lower New Mexico, and Mexico. *Id.*

It is clear from the structure and interplay of the articles of the 1938 Compact – specifically Articles I-IV, VI, VII, and VIII – that the 1938 Compact presumes and fully relies upon the Rio Grande Project, and protects water deliveries to the Project. But the purposes identified in Article I's definition of "Usable Water" and in Article VIII indicate that the 1938 Compact also protects the water that is released from Elephant Butte in order for it to reach its intended destination. "Usable Water" is that water "available for release in accordance with irrigation demands, including deliveries to Mexico." *Id.* at 786. And the purpose of Article VIII's grant to Texas allowing it to make a water call each January on Colorado and/or New Mexico to release stored water sufficient to bring the Usable Water in Project Storage to 600,000 acre-feet is so "that a normal release of 790,000 acre-feet may be made from

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[53] *See* Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 194-96 (1974).

project storage that year" to meet the Project's contractual irrigation demands. *Id.* at 790.

The text and structure of the 1938 Compact do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir, as New Mexico asserts. Rather, the 1938 Compact is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share. New Mexico's obligations under the 1938 Compact do not end discretely at Article IV, but are woven throughout the 1938 Compact to effect the overall purpose of the Compact.

In the context of New Mexico's Motion to Dismiss, I am required to assume as true, under Rule 12(b)(6), Texas's factual allegation that New Mexico, through its officers, agents, and political subdivisions, is diverting or intercepting water that belongs to Texas after Reclamation releases it from Elephant Butte Reservoir to irrigate lands of the Rio Grande Project. Those actions by New Mexico, if true, would render senseless and purposeless the numerous 1938 Compact articles outlining the basic accounting structure of the deal struck among the signatory States. With the defined terms found in Article I, the 1938 Compact articles: (i) requiring New Mexico to "deliver" water to the Project using the fixed delivery schedule based upon gauges and measurements of river flow, *id.* at 786-87, 788 (Articles II & IV); (ii) requiring Colorado and New Mexico to calculate and limit the debits and credits each can accrue,

id. at 789 (Article VI); (iii) protecting access to Rio Grande flood waters for New Mexico below Elephant Butte and for Texas, *id.* at 790 (Article VII); and (iv) allowing Texas the right to demand Colorado and New Mexico release water in January of each year to bring the volume of usable water in Elephant Butte Reservoir to 600,000 acre feet during the first quarter to ensure the Rio Grande Project can make its deliveries, *id.* (Article VIII), are *all void* if New Mexico delivers water to the Rio Grande Project at Elephant Butte Reservoir and then immediately grabs it back upon release from the Reservoir. An acceptance of New Mexico's reading of the 1938 Compact would require me to violate "a cardinal principle of statutory construction" which requires me to avoid construing the Compact in such way that renders entire articles "superfluous, void, or insignificant." *TRW Inc.*, 534 U.S. at 31. Indeed, conversely, New Mexico has identified in its pleadings and at oral argument *no* provision in the 1938 Compact that would allow it to recapture water it has delivered to the Rio Grande Project upon release from the Elephant Butte Reservoir. *See* Hr'g Tr. 39:10-40:11, Aug. 19, 2015.

Moreover, New Mexico's narrow reading of the 1938 Compact also leaves the question of Texas's equitable apportionment under the 1938 Compact an open, major source of controversy. To accept New Mexico's reading would defeat the Compact's express purpose to remove all such causes of controversy:

> The State of Colorado, the State of New Mexico, and the State of Texas, *desiring to remove*

> *all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas*, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes. . . .

53 Stat. at 785 (emphasis added). Although the preamble by itself is not conclusive, it does support a holistic reading of the Compact by which each Article is given meaning and purpose, instead of the stunted interpretation that New Mexico advances. *See, e.g., Virginia v. Maryland*, 540 U.S. 56, 68-69 (2003).

C. The Purpose and History of the 1938 Compact Confirm the Reading That New Mexico Is Prohibited from Recapturing Water It Has Delivered to the Rio Grande Project After Project Water Is Released from the Elephant Butte Reservoir

Because the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the stream, no need exists to rely upon the history of the 1938 Compact to interpret that language. *See Kansas v. Colorado*, 514 U.S.

673, 690 (1995). But in addition to its text and structure, the purpose and history of the 1938 Compact confirm the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream, thereby supporting the finding that Texas has, in fact, stated a claim under the 1938 Compact. *See McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589-90, 600 (2004).

The Rio Grande Project was the culmination of years of national and international problem-solving, litigation, legislation, and negotiation by irrigators, engineers, and politicians to irrigate lands in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin. *See* discussion *supra* Part III.B-D. By the late 1920s, the number of acres irrigated below Elephant Butte Reservoir through Reclamation's administration of the Rio Grande Project totaled approximately 88,000 in New Mexico and 67,000 in Texas. *See* RIO GRANDE JOINT INVESTIGATION, at 74-75.

Even as the idea formed in 1924 for a commission to address the 1896 embargo in Colorado and "draft a form of compact between the States affected under which an equitable allocation of the use of the waters of the Rio Grande would be made," 66 CONG. REC. 591 (1924), representatives from New Mexico accepted then – as they do now – that Texas receives its water through Reclamation's administration of the Rio Grande Project, *see, e.g.*, Transcript of First Meeting

of Rio Grande River Compact Commission 11 (Oct. 26, 1924), http://dspace.library.colostate.edu; Hr'g Tr. 38:20-23, Aug. 19, 2015 (SM R. Doc. 37) ("The means by which the Texas water is delivered to the territorial jurisdiction of Texas is the Rio Grande Project."). The 1929 Interim Compact represented the intent to protect the status quo on the stream while Colorado received federal funding to capture and store water from the Closed Basin (which was not tributary water) so that eventually a "fair adjustment" of the Rio Grande among the States could be assigned through a permanent compact. Dec. 1934 Rio Grande Compact Comm'n Proceedings, at 6; *see also* Mar. 1937 Rio Grande Compact Comm'n Proceedings, at 3 ("[New Mexico's] idea of the [1929 Interim Compact] was more or less status quo of conditions on the river; to hold in that condition until some permanent compact could be drawn up which there could be equitable distribution of the waters.") (**DVD Doc. 4**). That commitment to maintain the status quo pending a permanent compact protected the apportionments of water below Elephant Butte made by Reclamation through the Rio Grande Project. *See* 1929 Interim Compact, 46 Stat. 770, 772 (stating in Articles V and XII that neither Colorado nor New Mexico would "cause or suffer the water supply of Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of each state unless and until such depletion is offset by increase of drainage return").

In September 1937, when the Rio Grande Compact Commission convened to review the *Rio Grande Joint*

Investigation and begin negotiations for a permanent compact, Colorado's written position as to Texas's equitable apportionment under a compact imported the "conditions obtaining on the river" at the signing of the 1929 Interim Compact, which included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation. Sept. 1937 Rio Grande Compact Comm'n Proceedings, at 10, 54 (**DVD Doc. 5**). Likewise, New Mexico also equated Texas's equitable apportionment of the Rio Grande with what it receives via the Rio Grande Project: "New Mexico is willing to negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled." *Id.* at 12, 59. Although Texas wanted to benefit more from the upstream States' future reclamation projects, it agreed that its allocation would be tied to the amount released by Reclamation in its administration of the Rio Grande Project. *Id.* at 13, 60. Once the States agreed on that premise, the debate turned to the details of scheduling water deliveries to be made by the upstream States. *See id.* at 32-34, 61-65.

After working with their engineer advisers to forge delivery schedules, each Commissioner of the Rio Grande Compact Commission appointed two legal advisers to represent each State's interest and "to prepare a tentative draft [of a compact] which will incorporate in substance the report of the engineers and provide administrative machinery." Mar. 1938 Rio

Grande Compact Comm'n Proceedings, at 31 (**DVD Doc. 8**). Notably, the Texas Commissioner appointed to advocate for Texas's interests counsel for each of the two irrigation districts served by the Rio Grande Project: El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation District, *see id.* at 31, as "from both the legal and practical standpoint there is an identity of interests," May 1938 Lower Rio Grande Water Users Meeting Proceedings, at 11 (**DVD Doc. 14**).

After the 1938 Compact was signed by the Commissioners, ratification proved difficult in Texas, owing to some confusion regarding the 1938 Compact's apportionment of water to Texas. To clarify that issue, a Texas attorney representing a water district downstream of lands irrigated by the Rio Grande Project wrote to Frank Clayton, the Rio Grande Compact Commissioner from Texas:

> I do not find anything in the compact, however, which ties down and limits the use or division of the waters according to present usage and physical conditions, and nothing that would prevent controversy between the two States in the future regarding the division of the waters between the two States.
>
> This omission is too obvious to have been inadvertent and, therefore, unquestionably, the Commissioners had what they considered a valid reason for it. On behalf of a number of interested parties in this area, I would appreciate it very much if you would advise me why

> the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms.

Sept. 1938 Sawnie Smith Letter (**DVD Doc. 25**). In response, Frank Clayton answered:

> It was decided prior to the signing of the temporary compact that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir, and this provision was inserted in the temporary compact. . . .
>
> The Rio Grande Project, as you know, is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time. . . .
>
> . . . .
>
> [T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the district under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant

> Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent. [sic] for each figure.

Oct. 1938 Frank Clayton Letter (**DVD Doc. 26**).

It is plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters. Even today, New Mexico does not object to that conclusion: "We don't have any serious argument that the compact incorporates a 43 percent [of Project water] to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact." Hr'g Tr. 40:6-9, Aug. 19, 2015 (SM R. Doc. 37). In light of the fact that the 1938 Compact was negotiated "in the shadow [of the Supreme Court's] equitable apportionment power," *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015) – indeed, Texas had just filed suit against New Mexico in 1935 claiming violations of the 1929 Interim Compact, *see* Part III.F.2 & n.43 – it is unfathomable to accept that Texas "would trade away its right to the Court's equitable apportionment," *Kansas*, 135 S. Ct. at 1052, had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas, upon its immediate release from the Reservoir.

D. Application of the Supreme Court's Doctrine of Equitable Apportionment Also Prohibits New Mexico from Recapturing Project Water After That Water Is Released from the Elephant Butte Reservoir Through the Administration of the Rio Grande Project

An interstate stream used beneficially in each State through which it passes is considered to be "more than an amenity, [but rather] a treasure [that] offers a necessity of life that *must be rationed* among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (emphasis added); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Here, the Rio Grande rises in Colorado, flows through New Mexico and Texas, providing the border between Texas and Mexico, and then empties into the Gulf of Mexico. Therefore, all three States have power over the Rio Grande and each is entitled to an equitable apportionment thereof. And that is the goal they achieved in negotiating and ratifying the 1938 Compact. The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably by compact all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, at 1; *see also supra* Part II.B (discussion of doctrine of equitable apportionment).

New Mexico concedes that Texas received an equitable apportionment of the Rio Grande waters through the 1938 Compact, *see* Hr'g Tr. 34:13-22, Aug. 19, 2015

(SM R. Doc. 37), and it concedes that the signatory States to the 1938 Compact allocated Texas's equitable apportionment to the Rio Grande Project, *see* Hr'g Tr. 35:13-36:12, Aug. 19, 2015 (SM R. Doc. 37); Mot. to Dismiss at 31-32. New Mexico, however, argues that the 1938 Compact imposes upon it no obligations to ensure that Rio Grande Project deliveries (*i.e.*, Texas's equitable apportionment) arrive at the New Mexico-Texas state line; therefore, New Mexico asserts that it may intercept and divert water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line because that water – and, indeed, the entire administration of the Rio Grande Project within New Mexico – is governed by New Mexico state water law. *See* Mot. to Dismiss at 37-63; *see also* Hr'g Tr. 31:11-12, Aug. 19, 2015 (SM R. Doc. 37) ("The compact does not prevent New Mexico from interfering with [P]roject water."). But New Mexico's argument regarding its duties under the 1938 Compact ignores the effect that equitable apportionment via compact has upon all other prior appropriations granted by state law. The equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law.

In participating in the negotiation and ratification of the 1938 Compact as a quasi-sovereign, New Mexico "had power to bind by compact [its] . . . appropriators by division of the flow of the stream" in any way it saw

fit. *Hinderlider*, 304 U.S. at 108. At the time of the signing of the 1938 Compact, Reclamation had operated the Rio Grande Project for over twenty years, irrigating lands below Elephant Butte Reservoir in lower New Mexico and Texas, as well as delivering water to Mexico pursuant to the Convention of 1906, by releasing water from the Reservoir, the primary water-storage location for the Rio Grande Project. "To secure the greatest beneficial use of the water in the stream," *id.* (internal quotations omitted), the signatory States of the 1938 Compact utilized the existing Rio Grande Project as the vehicle by which Texas would receive its equitable apportionment of the Rio Grande waters, and, indeed, by which New Mexico would also receive a portion of its equitable apportionment. Not only does the negotiating history of the 1938 Compact support that assertion, *see* discussion *supra* Part III.E.-F., but today New Mexico recognizes that understanding as well, *see, e.g.*, Hr'g Tr. 38:18-23, 40:6-9, Aug. 19, 2015 (SM R. Doc. 37) ("The means by which the Texas water is delivered to the territorial jurisdiction of Texas is the Rio Grande Project. It is . . . the Texas apportionment. . . . We don't have any serious argument that the compact incorporates a 43 percent to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact."). Therefore, the Project water leaving Elephant Butte

belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906.[54]

The equitable apportionment of the Rio Grande as agreed upon in the 1938 Compact by Colorado, New Mexico, and Texas "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 106. As New Mexico possesses the right only to its equitable share of the Rio Grande and cannot grant water rights in excess of that equitable share, "the apportionment made by the Compact can not have taken from [New Mexico's prior appropriators] any vested right." *Id.* at 108. That said, New Mexico, through its agents or subdivisions, may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for deliveries pursuant to the administration of the Rio Grande Project. That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico.

Indeed, it may seem strange that New Mexico cannot intercept or divert even that portion of water that is delivered via the Rio Grande Project to lower New

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[54] This is not the only instance where equitable apportionment is premised upon the operation of a federal reclamation project and its distribution of water pursuant to contract, as the Court has recognized. *See Nebraska v. Wyoming*, 515 U.S. 1, 16-18 (1995).

Mexico water users comprising the Elephant Butte Irrigation District. But as one signatory State's high court has held: "If the water of [an interstate stream] becomes subject to equitable apportionment by compact, *the stream[ ] must be administered as mandated by compact. . . .*" *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914, 923 (Colo. 1983) (emphasis added). In *In re Rules & Regulations*, the Colorado Supreme Court dealt with a group of prior appropriators challenging the Colorado State Engineer's administration of the Conejos River and the main stem of the Rio Grande in strict accordance with the dual delivery schedules identified in the 1938 Rio Grande Compact. The prior appropriators argued that because the Conejos River had been considerably depleted through increased well-pumping, decreased snowpack runoff, and more efficient irrigation, the administration of the Conejos River pursuant to strict adherence to the schedules identified in the 1938 Compact created hardships for prior appropriators on the river and diminished their water rights. *Id.* at 920. Therefore, they argued that "a unitary state obligation, which would combine the delivery obligations of both streams as a total obligation for Colorado, to be reallocated in conjunction with the prior appropriation doctrine, best meets the constitutional and statutory prior appropriation doctrine." *Id.* at 922. Although the Colorado Legislature had passed a statute "which mandates that compacts which are deficient in provision for interstate

administration be implemented so as to 'restore lawful use conditions as they were before the effective date of the compact insofar as possible,'" *id.* at 923, the Colorado Supreme Court held that statute to be inapplicable, as "the separate delivery obligation is clear on the face of the compact," *id.* at 925. Therefore, the Colorado Supreme Court held that the State Engineer had no discretion to administer the Conejos River and Rio Grande's main stem differently in order to effect Colorado's deliveries under the 1938 Compact: "Although the impact of the Conejos River of separate delivery administration has been severe, particularly on the small farmers and ranchers who depend exclusively on a surface supply, the state engineer did not have any means of addressing that problem in the exercise of his compact rule power. . . ." *Id.*

Although New Mexico concedes "that Reclamation rather than the State of New Mexico is the entity with the power and duty to distribute the water after New Mexico delivers it into Elephant Butte Reservoir," Mot. to Dismiss at 38, it nevertheless argues that its state water law has been ignored:

> Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act.

Reply Br. at 14-15. But as discussed above, through the 1938 Compact, New Mexico itself, as a quasi-sovereign, relinquished its own rights to the water it delivers in Elephant Butte Reservoir, allocating the rights to that water instead to the Rio Grande Project to irrigate lands in Texas and lower New Mexico (and the Republic of Mexico pursuant to the Convention of 1906). New Mexico state law does not govern the distribution of the water apportioned by Compact. "Equitable apportionment, a federal doctrine, can determine times of delivery and sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the water which has not been committed to other states by the equitable apportionment." *In re Rules & Regulations*, 674 P.2d at 922 (citing *Hinderlider*, 304 U.S. 92, 106-08 (1938)). Therefore, any question of the rights of any signatory State to water apportioned by the 1938 Compact – including the rights to that portion of water mandated by compact to be delivered to lower New Mexico via the Rio Grande Project – must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court. *See Hinderlider*, 304 U.S. at 110.

Moreover, New Mexico's statutes indicate that compliance with interstate compact deliveries is "imperative." *See, e.g.*, N.M. STAT. ANN. § 72-2-9.1(A); *see also* N.M. STAT. ANN. § 72-14-3.1(B)(6); *Montgomery v. Lomos Altos, Inc.*, 150 P.3d 971, 976 (N.M. 2006) (discussing rules promulgated by the Office of the State Engineer to ensure compliance with compacts, including the 1938 Compact). And the 1938 Compact

sufficiently dictates the method of its administration: the delivery of Texas's apportionment and lower New Mexico's apportionment must be made via Reclamation's administration of the Rio Grande Project. Therefore, New Mexico, like the Colorado State Engineer in *In re Rules & Regulations*, is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point be controlled and delivered to its destinations by Reclamation.

For the foregoing reasons, I recommend that the Supreme Court deny New Mexico's motion to dismiss the Complaint filed by Texas, as Texas has stated plausible claims for New Mexico's violation of the 1938 Compact.

V. New Mexico's Motion to Dismiss the United States' Complaint in Intervention

The Supreme Court granted leave to the United States on March 31, 2014, to intervene in these proceedings to protect federal interests related to the issues in this litigation. *See* 134 S. Ct. 1783 (2014). In its Complaint in Intervention, the United States alleges that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts,"

in violation of federal reclamation law. Compl. in Intervention, ¶ 13. The United States also alleges that New Mexico's diversions below Elephant Butte Reservoir negatively interfere with the United States' contractual obligations to deliver water to its consumers, including its obligation pursuant to the Convention of 1906 to deliver water to Mexico. *Id.* ¶¶ 14-15. The United States seeks declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to intercept or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference. *Id.* at 5.

New Mexico moves to dismiss the United States' Complaint in Intervention for failure to state a claim under the terms of the 1938 Compact upon which relief can be granted. New Mexico asserts that it possesses no affirmative duty under the 1938 Compact to prevent interference with the United States' ability to fulfill long-standing obligations to deliver water pursuant to the Rio Grande Project. *See id.* at 59-61; *see also* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation

Act."). And in the event that the Supreme Court dismisses Texas's Complaint for failure to state a plausible claim under the 1938 Compact (thereby removing the basis for the Court's original jurisdiction over the matter pursuant to 28 U.S.C. § 1251(a)), New Mexico argues that the Court should decline to extend its jurisdiction under § 1251(b)(2) and hear the United States' Complaint in Intervention as more appropriate venues exist in which the United States may assert its Project claims against New Mexico. *See* Mot. to Dismiss at 63-64.

As stated above, *see* discussion *supra* Part IV, the 1938 Compact utilizes the Rio Grande Project as the single vehicle by which to apportion the waters of the Rio Grande to Texas and New Mexico below Elephant Butte Reservoir, as well as to Mexico pursuant to the Convention of 1906.[55] The 1938 Compact also imposes duties upon Colorado to maintain scheduled deliveries to New Mexico, as well as upon New Mexico to maintain scheduled deliveries to the Project and to protect Project deliveries from Elephant Butte Reservoir to ensure that Texas and lower New Mexico receive their bargained-for apportionments of Rio Grande water. That said, however, the crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its

[55] The 1938 Compact expressly protects Project "deliveries to Mexico" made pursuant to the Convention of 1906. 53 Stat. 786.

ability to deliver Project water to its consumers as required by contract or by convention. *See* Compl. in Intervention, ¶¶ 13-15. As an initial matter, in evaluating whether the United States has stated a plausible claim under the 1938 Compact, I must determine whether the 1938 Compact confers upon the United States the right to assert federal reclamation law claims against quasi-sovereign New Mexico, as the United States itself is not a signatory to that compact and received no apportionment of Rio Grande water through the compact.

A. The United States' Litigation Roles Within Original Actions Resolving Interstate Stream Disputes

A review of the roles of the United States in original actions to apportion interstate streams or to enforce compacts or decrees apportioning those streams reveals that, historically, the United States has participated primarily as *amicus curiae*. *See, e.g.*, *Kansas v. Nebraska*, 562 U.S. 820 (2010) (inviting Acting Solicitor General to file briefs expressing views of the United States in a dispute regarding the enforcement of the Republican River Compact); *Montana v. Wyoming*, 550 U.S. 932 (2007) (inviting Solicitor General to file briefs expressing views of the United States in a dispute regarding the enforcement of the Yellowstone River Compact); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922) ("Here the complaining state [seeks] to have the common policy [of prior appropriation] which each [quasi-sovereign party] enforces within her limits applied in

determining their relative rights in the interstate stream. Nor is the United States seeking to impose a policy of its choosing on either state. All that it has done has been to recognize and give its sanction to the policy which each has adopted. Whether its public land holdings would enable it to go further we need not consider.").

On occasion, the United States has been granted leave to intervene as a party in original actions to apportion interstate streams among States; in those contexts, the United States intervenes to protect unique sovereign interests regarding federal reclamation projects or Native American relations. *See, e.g., Arizona v. California*, 373 U.S. 546 (1962). The case of *Nebraska v. Wyoming* provides useful instruction as to the scope of the United States' role both initially in an action to apportion the waters of an interstate stream, as well as the scope of its role in a subsequent action to enforce the decree or compact apportioning a stream.

In 1934, the State of Nebraska filed suit against the State of Wyoming,[56] invoking the original jurisdiction of the Supreme Court and asking the Court to settle disputes regarding alleged misappropriations of the North Platte River. The Court granted leave to the United States to intervene as a party defendant in that original action in order to assert its own rights to both

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[56] The State of Colorado was impleaded as a defendant in the proceedings and filed an answer with a cross-bill against Nebraska and Wyoming, requesting the Court to equitably apportion the North Platte River among the States. *See Nebraska v. Wyoming*, 325 U.S. 589, 591-92 (1945).

non-navigable, unappropriated water in the river, as well as its rights in water appropriated under federal reclamation law in its operation of federal reclamation projects on the river. *See* Brief for the United States of America, Intervenor at 14-18, *Nebraska v. Wyoming*, 1945 WL 48651 (Jan. 24, 1945) (No. 108, Original); *see also Nebraska v. Wyoming*, 304 U.S. 545 (1938) (granting United States leave to intervene). During the proceedings, the United States first asserted that its management of federal reclamation projects on the river would be jeopardized without recognition of its rights as owner of unappropriated water it claimed it had obtained under the 1902 Reclamation Act. *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945). Rejecting that argument, the Court challenged the United States' ownership of that unappropriated water:

> 'Although the government diverted, stored, and distributed the water, the contention . . . that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction

> and annual charges for operation and maintenance of the works.'

Id. at 614 (quoting *Ickes v. Fox*, 300 U.S. 94, 95 (1937)). In denying the United States its own allocation of the unappropriated waters of the North Platte River, the Court noted:

> We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system [that, for example, regulates the charges which the owners of canals or reservoirs may make for the use of water]. We are dealing here only with an allocation, through the States, of water rights among appropriators. The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens parens patriae in this proceeding, in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities. Thus the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned.

Id. at 615-16.

The Court further held that the United States was not entitled to its own separate allocation of water

even as the mere possessor of federal reclamation project water:

> The Special Master concluded that the position of the United States or the Secretary of the Interior is that of an appropriator of water for storage under the laws of Wyoming and that its interests are represented in that connection by Wyoming. That was in line with the ruling of this Court when Wyoming moved to dismiss this very case on the ground, among others, that the Secretary of the Interior was a necessary party. [*See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).] The Court said: 'The bill alleges, and we know as a matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.' We have discussed the procedure of appropriation which has been followed in this region. The Secretary of the Interior made the appropriations under Wyoming law. But we have noted that the water rights were adjudicated to be in the individual landowners. Hence, so far as the water rights are concerned, *we think it is not proper to analogize this case to one where the United*

> *States acquires property within a State and asserts its title against the State as well as others.*

Id. at 629 (emphasis added). The United States finally pressed that "it is at least entitled to be recognized as the owner of the [project] storage water with full control over its disposition and use under Wyoming law." *Id.* at 629-30. The Court, recognizing the truth of that assertion under Wyoming law, held that:

> The decree which is entered will in no way cloud such claim as it has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow.

Id. at 630. The Court then proceeded to resolve the disputes among Nebraska, Wyoming, and Colorado by issuing a decree in 1945 apportioning the natural flow of the North Platte River (but not water stored in federal reclamation projects) among those States. *See id.* at 620-57.[57]

Over forty years after the Court issued its decree in *Nebraska v. Wyoming* apportioning the North Platte River, Nebraska petitioned the Court in 1986 to reopen

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[57] The Court modified the 1945 decree in 1953 to address issues raised by the United States' construction of another reservoir on the river. *See Nebraska v. Wyoming*, 345 U.S. 981 (1953).

the case to enforce the 1945 decree as against Wyoming. Nebraska asserted no claims against the United States.[58] Wyoming, however, asserted a cross-claim against the United States for declaratory and injunctive relief, alleging that federal mismanagement of reservoirs on the North Platte River in contravention of state and federal law as well as contracts governing water supply to individual users had the effect of interfering with Wyoming's apportionment of water as rationed by the Supreme Court's 1945 decree. 515 U.S. 1, 15 (1995).

In opposition to Wyoming's motion to amend its claims to include the cross-claim, the United States argued, in part, that Wyoming did not state a cognizable claim under the 1945 decree, as "the decree expressly refrained from apportioning storage water." *Id.* The Special Master found that "'even though the decree did not apportion storage water, it was framed based in part on assumptions about storage water rights and deliveries,' and [recommended] that therefore 'Wyoming should have the opportunity to go forward with her claims that the United States has violated the law and contracts rights and that such violations have the effect of undermining Wyoming's apportionment.'" *Id.*

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[58] According to the Special Master appointed by the Court, "[t]he United States was an intervenor in the original proceedings leading to the 1945 Order and Decree and . . . remained as a party in the current proceedings." Second Interim Rep. on Motions for Summary Judgment and Renewed Motions for Intervention at n.4, Nebraska v. Wyoming (Apr. 9, 1992) (No. 108, Original), http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx.

at 16 (quoting the Special Master's Third Interim Report). The Court agreed, explaining:

> The availability of storage water and its distribution under storage contracts was a predicate to the original apportionment decree. Our 1945 opinion expressly recognized the significance of storage water to the lands irrigated by the pivotal reach, noting that over the prior decade storage water was on average over half of the total supply and that over 90 percent of the irrigated lands had storage rights as well as rights to natural flow. . . .
>
> . . . [W]e anticipated that the storage supply would be left for distribution in accordance with the contracts which govern it. In doing so, we were clearly aware of the beneficial use limitations that govern federal contracts for storage water [including § 8 of the Reclamation Act of 1902]. . . .
>
> Under this system, access to water from storage facilities was only possible by a contract for its use, and apportionment of storage water would have disrupted that use. . . . But although our refusal in 1945 to apportion storage water was driven by a respect for the statutory and contractual regime in place at the time, we surely did not dismiss storage water as immaterial to the proper allocation of the natural flow in the pivotal reach. And while our decree expressly protected those with rights to storage water, it did so on the condition that storage water would continue to be

> distributed in accordance with lawful contracts.

Id. at 17-18 (internal quotation and citations omitted). Despite the fact that the United States was not awarded its own water allocation in the 1945 decree of the Court and argued that the decree, therefore, afforded no causes of action against it, the Court held that because "Wyoming argue[d] only that the cumulative effect of the United States's failure to adhere to the law governing the contracts undermines the operation of the decree," it had "state[d] a claim arising under the decree itself, one by which it [sought] to vindicate its quasi-sovereign interests." *Id.* at 20 (internal quotations and citations omitted).

The United States' role in the 1986 enforcement action of the 1945 decree extended only to its defense of quasi-sovereign Wyoming's cross-claim against it. It asserted no cross-claims against any quasi-sovereign – indeed, given its argument that the 1945 decree afforded Wyoming no cognizable claim against the United States regarding its administration of federal reclamation projects on the North Platte River because the decree did not apportion water to the United States, the United States may have been hard-pressed to use the 1945 decree in turn as the basis by which to assert claims of misappropriation of project water or interference with federal reclamation contracts connected to its administration of federal reclamation projects on the river.

B. The 1938 Compact Does Not Transform the United States' Federal Reclamation Claims into Compact Claims By Virtue of Its Utilization of the Project to Effect the Apportionment of Rio Grande Waters to Texas and New Mexico

Given the foregoing guidance and precedent, I turn to the examination of the 1938 Compact and whether that agreement affords the United States, a non-signatory, any cognizable claim against quasi-sovereign New Mexico. For the first time in its history of litigating within original actions to apportion interstate streams among States or to enforce compacts or decrees apportioning those streams, the United States here has intervened as a *party plaintiff*, alleging as the basis for its claims against New Mexico that it "has a *right protected by the Compact* to deliver Project water to contract holders in both [New Mexico and Texas] in accordance with irrigation demands, and to Mexico." U.S. Opp. Mot. to Dismiss at 25 (emphasis added). Specifically, the United States argues that "[t]he United States has a claim under the Compact because the Compact incorporates the Project and designates the '[u]sable water' in project storage as water that is 'available for release in accordance with irrigation demands, including deliveries to Mexico.'" *Id.* at 52 (citing Art. I(*l*), 53 Stat. 786).

But the 1938 Compact is an agreement among three quasi-sovereign States to apportion the Rio Grande – to which each has an equitable right – among themselves. The United States is not a signatory to the

1938 Compact – indeed, it received no apportionment of Rio Grande water through the compact. The United States has no claim itself to the natural flow of an interstate stream, as does a State through which the stream passes. *See New Jersey v. New York*, 283 U.S. 336, 342 (1931); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). The Supreme Court's characterization in 1945 of the United States' ownership of any part of an interstate stream in the context of its administration of a federal reclamation project is as accurate here today as it was then: After the Desert Land Act effected a severance of all waters upon the public domain and made free for appropriation for a beneficial use all unappropriated water, the 1902 Reclamation Act granted the United States the opportunity to appropriate that water in accordance with state law for the purpose of building and administering federal reclamation projects. *See Nebraska v. Wyoming*, 325 U.S. 589, 613 (1945). The United States then contracted with individual water users, and later irrigation districts, for the use of project water. *Id.* The United States here obtained the water rights on which the Rio Grande Project rests in compliance with New Mexico state law pursuant to the 1902 Reclamation Act. "Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." *Id.* at 615.

The fact that the three signatory States to the 1938 Compact chose to use the Rio Grande Project, which had been in operation for years prior to the

negotiation and signing of the compact, as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir does not give the United States a right of action under the 1938 Compact. Applying the holding of the Court in the 1986 enforcement action in *Nebraska v. Wyoming* allowing Wyoming's cross-claim against a non-party to the 1945 decree to proceed, I find that, here, in order to state a claim under the 1938 Compact itself, the United States would have to assert "violations [which] have the effect of undermining [its own] apportionment [of water]." *Nebraska v. Wyoming*, 515 U.S. 1, 16 (1995). The 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the compact against New Mexico.

C. The Court Should Nevertheless Exercise Its Discretion to Extend Its Original, But Not Exclusive, Jurisdiction Under 28 U.S.C. § 1251(b)(2) to Hear the United States' Project Claims Against New Mexico

Despite the fact that the United States is prohibited as a non-signatory to the 1938 Compact from asserting claims under that compact, it nevertheless has stated a plausible claim against New Mexico under federal reclamation law:

> The United States . . . has a distinct interest in ensuring that water users who either do not have contracts with the Secretary of

> the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries or for delivery to Mexico. . . .

United States Mot. for Leave at 2; *see also* Compl. in Intervention, ¶¶ 8, 12, 13, 14, 15.

Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), to evaluate a motion to dismiss under Rule 12(b)(6), I must assume as true the United States' allegation that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts." Compl. in Intervention, ¶ 13. Federal reclamation law has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project, *see, e.g.*, 43 U.S.C. §§ 423d, 423e, 431, 439, 461, and that requirement of a contract for project water extends to seepage and return flows, which are included as project water in federal reclamation projects. *See Bean v. United States*, 163 F. Supp. 838 (Ct. Cl. 1958) (citing *Ide v. United States*, 263 U.S. 497, 505 (1924)).

Because the United States does not have a right to assert claims against New Mexico under the 1938 Compact, its claims cannot be properly resolved by the Supreme Court pursuant to its original and exclusive

jurisdiction, which is reserved for resolution of "controversies between two or more states." 28 U.S.C. § 1251(a). But the United States can nevertheless properly assert its claims against New Mexico in the Supreme Court, invoking the Court's original, but not exclusive, jurisdiction pursuant to § 1251(b)(2), which is reserved for "controversies between the United States and a State."[59] The Court has previously indicated that it will exercise its jurisdictional grant under § 1251(b)(2) over suits brought by the United States against a state in "appropriate circumstances," but only "sparingly"; moreover, it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum." *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). In *Maryland v. Louisiana*, several States challenged Louisiana's "First-Use Tax" on natural gas brought into Louisiana from elsewhere, including from the Outer Continental Shelf ("OCS"). *Id.* at 728. In accepting the Special Master's recommendation to permit the United States to intervene, the Court found that a suit in a district court "would not include the plaintiff States," and thus "would be an inadequate forum in light of the present posture of the case." *Id.* at 744. Additionally, the Court reasoned that "the interests of the United States in protecting its rights in the OCS area, with ramifications for all

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[59] The United States acknowledged and invoked this basis for jurisdiction in the Brief of the United States in Opposition to New Mexico's Motion to Dismiss Texas's Complaint in Intervention, filed June 2014, at 1; at 51-52; and during oral argument. *See* Hr'g Tr. 98:7-11, Aug. 19, 2015 (SM R. Doc. 37).

coastal States, as well as its interests under the regulatory mechanism that supervises the production and development of natural gas resources," made the case appropriate for the exercise of § 1251(b)(2) jurisdiction. *Id.* at 744-45.

I have recommended that the Court deny New Mexico's motion to dismiss Texas's Complaint, as Texas has alleged plausible claims under the 1938 Compact. If the Court affirms that recommendation, I recommend that the Court extend its original jurisdiction under § 1251(b)(2) to consider and resolve the claims made in the United States' Complaint in Intervention concurrently with those made by Texas for purposes of judicial economy. The resolution of the 1938 Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues. Indeed, Texas's Complaint prays that the Court should order New Mexico to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." Compl. at 16.

Furthermore, whether the Court affirms or rejects my recommendation to deny New Mexico's motion to dismiss Texas's Complaint, resolution of the United States' claims by the Court is nevertheless desirable due to the interstate nature of the Rio Grande Project. In moving to dismiss the United States' Complaint in Intervention, New Mexico argues that the United States should simply "invoke the authority of the New

Mexico State Engineer under state law" and make a call on the river as a senior appropriator to prioritize its claims to Rio Grande waters on behalf of the Rio Grande Project. Mot. to Dismiss at 62. That recourse, however, works best only to resolve intrastate water use disputes. For example, the United States recently made a priority call in order to regulate or prioritize water rights for the benefit of the Klamath Project, a federal reclamation project serving Oregon and California, but, importantly, that process worked because the call was made to regulate only water users within a particular state; the alleged misappropriations did not affect the apportionment made by the governing compact between Oregon and California or any other interstate obligations. *See* Hr'g Tr. 99:6-25, 101:11-19, Aug. 19, 2015 (SM R. Doc. 37). Therefore, resolution of an entirely intrastate issue was appropriately resolved under that State's law by the State Engineer.

But the United States' claims here involve more than "competing claims to water within a single State," over which the Court has expressed reluctance to exercise its original jurisdiction. *See United States v. Nevada & California*, 412 U.S. 534, 538 (1973).[60] As

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[60] I add that the primary reason the Court declined to grant the United States' motion for leave to file a bill of complaint seeking a declaration of the rights of the States and of the United States in the Truckee River is because, after the United States filed its motion, the States of California and Nevada entered into a compact apportioning the river on behalf of all appropriators and providing for the rights of the United States, thereby mooting the controversy. *See United States v. Nevada & California*, 412 U.S. 534, 538-39 (1973). The Court denied the motion without prejudice so that the United States could refile its motion "should the

explained by the United States, "the [Rio Grande] project operates as a whole and has interstate obligations," Hr'g Tr. 98:12-13, Aug. 19, 2015 (SM R. Doc. 37); indeed the Rio Grande Project has international obligations as well, as the Project is required to fulfill the United States' treaty obligations to Mexico regarding the delivery of Rio Grande waters. Unlike the allegations regarding the Klamath Project, both Texas and the United States allege that the misappropriations of water by New Mexico through her agents and citizens affect and diminish the 1938 Compact's apportionment of water to Texas and, possibly, to Mexico. Because other sovereigns have significant interests in the resolution of the United States' project claims, it would be inappropriate to allow the New Mexico State Engineer to resolve those claims.[61] I submit that those claims are best resolved by this Court in light of the various other interstate and international obligations and interests.

Therefore, based upon the standard of review for motions filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Supreme Court precedent,

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posture of the litigation change in a manner that presents a more substantial basis for the exercise of [the Court's] original jurisdiction." *Id.* at 540.

[61] Indeed, at one point, the New Mexico State Engineer agreed. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1178 (10th Cir. 2002) (discussing a 1986 action filed to adjudicate water claims on the Rio Grande between Elephant Butte and the Texas state line and observing that the New Mexico State Engineer moved to dismiss the action, arguing that "the state court did not have personal jurisdiction over Project water users in Texas who were indispensable parties").

the pleadings filed by the parties, the oral arguments advanced by those parties, and for the reasons stated above, I recommend that the Court grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent that the United States cannot state a plausible claim under the 1938 Compact; but to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Rio Grande Project, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) to allow for the resolution by the Court of the United States' project claims to occur simultaneously with the resolution of Texas's compact claims against New Mexico.

VI. Elephant Butte Irrigation District's Motion to Intervene

On December 3, 2014, Elephant Butte Irrigation District ("EBID") filed a motion for leave to intervene as a party to these proceedings. EBID is an "irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico." EBID Mot. to Intervene at 2. Its boundaries lie wholly within New Mexico. According to EBID, it "was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under the federal reclamation laws in providing water supplies from the lower Rio Grande for irrigation of lands in southern New Mexico." *Id.; see also* N.M. STAT. ANN. § 73-10-16.

Essentially, EBID is contractually responsible to the United States to manage Rio Grande Project deliveries within New Mexico after Reclamation determines EBID's share of water pursuant to its administration of the Project. EBID Mem. in Support at 3-4, 20.

EBID is not a party to the 1938 Compact. Texas seeks no relief directly against EBID; EBID is not specifically mentioned in Texas's Complaint, other than the identification of EBID as "a political subdivision of the State of New Mexico [and] the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico." Compl. ¶ 8. Similarly, the United States seeks no relief directly against EBID, and identifies EBID only as a contractual recipient of Rio Grande Project water. *See* Compl. in Intervention, ¶ 8. EBID nevertheless seeks leave to intervene as a party in this case, despite the fact that EBID's home state of New Mexico is already a party. EBID asserts that it has a unique and compelling interest in this case, one that is distinct from other New Mexico citizens, by virtue of its managerial role on behalf of the United States in administering the Rio Grande Project in New Mexico. *See* EBID Mem. in Support at 20-22.

On January 29, 2015, New Mexico, Texas, and the United States filed responses opposing EBID's motion; Colorado filed a limited response, refraining from either supporting or opposing EBID's motion, but purporting to reserve the right to file a response pending the outcome of the Court's decisions regarding New

Mexico's motion to dismiss.[62] On March 20, 2015, EBID submitted a reply brief in support of its motion and addressing the opposing responses. On April 27, 2015, the Supreme Court referred EBID's motion to intervene to me.

Counsel for movant EBID, as well as parties New Mexico, Colorado, Texas, and the United States presented oral argument at a hearing to consider the motion to intervene held in New Orleans, Louisiana, on August 20, 2015. Based upon the pleadings filed by the parties and the *amici curiae* as well as the oral arguments advanced by the parties, I recommend that the Court deny EBID's Motion for Leave to Intervene.

A. The Applicable Legal Standard for Intervention

The Supreme Court has established the standard governing intervention in an original action by a non-state entity: "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). That high standard "is a necessary recognition of sovereign dignity, as well as a working rule

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[62] The basis upon which Colorado believes it can file a response after the motion to intervene is granted or denied is not clear.

for good judicial administration." *New Jersey*, 345 U.S. at 373.

Interstate water disputes, reserved to the "original and exclusive jurisdiction" of the Supreme Court, 28 U.S.C. § 1251(a), necessarily invoke States' sovereignty, with "each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other," *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Indeed, "the parens patriae doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all citizens." *New Jersey*, 345 U.S. at 372 (internal quotations and citation omitted); *see also South Carolina*, 558 U.S. at 267 ("In its sovereign capacity, a State represents the interests of its citizens in an original action, the disposition of which binds the citizens."); *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("A State is presumed to speak in the best interests of [its] citizens. . . .").

"A respect for sovereign dignity, therefore, counsels in favor of restraint in allowing nonstate entities to intervene in such disputes." *South Carolina*, 558 U.S. at 267 (citations omitted). "Otherwise, a state might be judicially impeached on matters of policy by its own subjects. . . ." *New Jersey*, 345 U.S. at 373. Thus, in resolving a motion to intervene in an original jurisdiction action, it is appropriate to assume, absent evidence to the contrary, that States will adequately and appropriately represent the interests of their citizens, and, specifically in this case, its citizen water users.

In addition to respecting States' sovereign dignity, the Supreme Court's standard for intervention in original actions also addresses more practical concerns, those of judicial economy and administration. As explained by the Supreme Court, "[s]uch [original] actions tax the limited resources of this Court by requiring us 'awkwardly to play the role of factfinder' and diverting our attention from our 'primary responsibility as an appellate tribunal.'" *South Carolina*, 558 U.S. at 267 (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971) and *Maryland v. Louisiana*, 451 U.S. 725, 762 (1981) (Rehnquist, J., dissenting)). Without such a high standard for intervention in original actions, "there would be no practical limitation on the number of citizens . . . who would be entitled to be made parties." *New Jersey*, 345 U.S. at 373. Therefore, "[i]n order to ensure that original actions do not assume the 'dimensions of ordinary class actions,' . . . [the Supreme Court] exercise[s] [its] original jurisdiction 'sparingly' and retain[s] 'substantial discretion' to decide whether a particular claim requires 'an original forum in [the Supreme] Court.'" *South Carolina*, 558 U.S. at 267 (quoting *New Jersey*, 345 U.S. at 373 and *Mississippi v. Louisiana*, 506 U.S. 76, 76 (1992)).

"That the standard for intervention in original actions by nonstate entities is high, however, does not mean that it is insurmountable." *Id.* at 268. Intervention of nonstate entities is allowed "in compelling circumstances." *Id.* (citing *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922)). For example, the Supreme Court allowed two nonstate entities to intervene in *South*

Carolina v. North Carolina, a case in which South Carolina filed an original action seeking an equitable apportionment of the Catawba River, an interstate stream shared by the Carolinas, holding that both proposed intervenors had satisfied the high standard for intervention articulated in *New Jersey v. New York*. *Id.* at 259. The first entity, Catawba River Water Supply Project ("CRWSP"), sought intervention as a party-defendant, arguing that its interest as a water user was not adequately represented by either State, due to the CRWSP's "interstate nature." *Id.* at 260. The Supreme Court allowed CRWSP's intervention, holding that CRWSP had carried its burden to intervene by showing the following compelling circumstances:

> The CRWSP is an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States and designed to serve the increasing water needs of Union County, North Carolina, and Lancaster County, South Carolina. It has an advisory board consisting of representatives from both counties, draws its revenues from its bistate sales, and operates infrastructure and assets that are owned by both counties as tenants-in-common. We are told that approximately 100,000 individuals in each State receive their water from the CRWSP and that "roughly half of the CRWSP's total withdrawals of water from the Catawba River go to South Carolina consumers. It is difficult to conceive a more purely bistate entity.

> In addition, the CRWSP relies upon authority granted by both States to draw water from the Catawba River and transfer that water from the Catawba River basin. . . . [T]he complaint specifically identifies this transfer as contributing to South Carolina's harm.
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> . . . .
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> We are further persuaded that neither State can properly represent the interests of the CRWSP in this litigation. The complaint attributes a portion of the total water transfers that have harmed South Carolina to the CRWSP, yet North Carolina expressly states that it "cannot represent the interests of the joint venture." A moment's reflection reveals why this is so. In this dispute, as in all disputes over limited resources, each State maximizes its equitable share of the Catawba River's water only by arguing that the other State's equitable share must be reduced. . . . The stresses that this litigation would place upon the CRWSP threaten to upset the fine balance on which the joint venture is premised, and neither State has sufficient interest in maintaining that balance to represent the full scope of the CRWSP's interest.

Id. at 269-71 (internal citations omitted).

Similarly, in light of the "flexible process" requiring consideration of "all relevant factors" by which the Supreme Court "arrive[s] at a just and equitable apportionment of an interstate stream," the Supreme Court held that the second proposed intervenor, Duke

Energy Carolinas, LLC ("Duke Energy") had also carried its burden to intervene by showing the following compelling facts: (i) Duke Energy operated eleven dams and reservoirs spanning both States on the Catawba River pursuant to licensing by the Federal Energy Regulatory Committee ("FERC") and controlled the river's minimum flow into South Carolina, representing a unique interest apart from other citizens of either State party; and (ii) "Duke Energy ha[d] a unique and compelling interest in protecting the terms of its existing FERC license" and its renewal, which was governed by a Comprehensive Relicensing Agreement, an agreement which "represent[ed] the full consensus of 70 parties from both States regarding the appropriate minimum flow of Catawba River water into South Carolina under a variety of natural conditions." *Id.* at 271-73 (internal quotations and citations omitted). The Supreme Court concluded "that neither State sufficiently represent[ed] these compelling interests." *Id.* at 273.

B. EBID Has Not Met the Standard for Intervention

To justify its intervention in these proceedings, EBID asserts that it has a compelling interest in its own right, apart from the interests of other New Mexico citizens, because it "bears major responsibilities for managing the New Mexico portion of the Rio Grande Project, coordinating the delivery of the Texas portion of the Project water, and effectuating the congressional goal of protecting the integrity and feasibility of the

Rio Grande Project," purportedly making it "the only entity in this case that bears these major responsibilities and is not currently a party in this litigation." EBID Mem. in Support at 22. EBID further described its compelling interest during oral argument:

> [EBID] administers the Rio Grande Project in New Mexico. Elephant Butte, of course, was created under the laws of New Mexico for the purpose of cooperating with the United States in developing water supplies for the Rio Grande Project under the federal reclamation laws. So [EBID] is kind of a hybrid entity in the sense that it was created under New Mexico law but is created for the purpose of assisting and facilitating the development of a federal reclamation project authorized by Congress under the federal reclamation law.
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> In addition to that, and perhaps far more important, the United States has transferred the project facilities from itself to [EBID] after [EBID] repaid the costs of the project.

Hr'g Tr. 12:17-13:5, Aug. 20, 2015. EBID also argues that it has a compelling interest in this lawsuit because it "is a signatory to the 1938 contract that has historically apportioned Rio Grande Project water between New Mexico and Texas." Hr'g Tr. 16:18-21, Aug. 20, 2015. Citing the Supreme Court's descriptions of the 1902 Reclamation Act in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) and *Ickes v. Fox*, 300 U.S. 82 (1937), EBID further asserts that its interests are different from other New Mexico citizen water users as only "the surface water users in New Mexico who receive Project

water deliveries for irrigation of their lands possess the 'beneficial interest' in the Project water's rights, and EBID represents these New Mexico water users." EBID Mem. in Support at 23.

Moreover, EBID asserts that the State of New Mexico does not properly represent EBID's interests in these proceedings because "New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas." *Id.* at 24; *see also* Hr'g Tr. 18:12-19:3, Aug. 20, 2015. Finally, EBID argues not only that its interests "are not represented by the other parties in this litigation," EBID Mem. in Support at 27-29, but that it will assert different legal arguments than the parties, "which would help the Court to better understand the complicated issues raised in the case." *Id.* at 29. As EBID stated during oral argument:

> We argue that the compact itself does not apportion Rio Grande Project water or Rio Grande water itself between New Mexico and Texas.
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> . . . .
>
> In our view, the apportionment is governed not by the compact but, rather, by the contracts that have been signed by the United States and the two water districts, particularly the 1938 contract that has historically apportioned the water.

Hr'g Tr. 20:14-16, 20:22-21:1, Aug. 20, 2015. That argument, according to EBID, "provides an additional basis for intervention." EBID Mot. to Intervene at 4.

1. EBID's motion to intervene is procedurally deficient

As an initial matter, it is unclear on the face of EBID's papers as to whether EBID seeks intervention in this matter as a plaintiff or defendant. EBID did not attach to its motion to intervene a proposed Complaint in Intervention or other pleading setting forth the claims or defenses for which intervention is sought. Supreme Court Rule 17.2 states that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed[;] [i]n other respects, those Rules and the Federal Rules of Evidence may be taken as guides." Rule 24 of the Federal Rules of Civil Procedure requires that a motion to intervene "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c).

EBID cites *South Carolina v. North Carolina*, 558 U.S. 256, 276 n.8 (2010), and *Arizona v. California*, 460 U.S. 605, 614 (1983), *supplemented by* 466 U.S. 144 (1984), for the proposition that Supreme Court Rule 17.2 "provides only that the [Federal Rules of Civil Procedure are] taken as a 'guide' in original actions," concluding that "Rule 17.2 does not require strict

compliance with FRCP Rule 24(c), including its requirement that a motion to intervene must include a 'pleading.'" EBID Reply Br. at 39.

But EBID's reliance on *South Carolina* and *Arizona* to conclude that it is not required to attach to its motion to intervene a Complaint in Intervention or other pleading setting forth the claim or defense for which intervention is sought is tenuous at best. In *South Carolina*, the Supreme Court cited Rule 17.2 to note that the Rule 24 standard for permissive intervention gave way to the heightened standard for intervention in original actions articulated in *New Jersey v. New York* when the nonstate's interests can be adequately represented by its home State. 558 U.S. at 276 n.8. In *Arizona v. California*, sovereign Native American tribes sought intervention to participate in an adjudication of their water rights commenced by the United States, without asserting new claims against the State parties. 460 U.S. at 614. Acknowledging that the Supreme Court's "own rules make clear that the Federal Rules are only a guide to procedures in an original action," the Supreme Court held that the Tribes satisfied the standards for Rule 24 permissive intervention. *Id.* Although the Supreme Court identifies in both cases the advisory nature of federal procedural rules in original actions, that is where the appositeness of those cases to EBID's failure to append a proposed Complaint In Intervention to its motion to intervene ends.

Circuits that have taken a lenient approach to the requirements of Rule 24(c) and approved intervention

motions without an attached pleading setting forth the claim or defense for which intervention is sought have done so "where the court was otherwise apprised of the grounds for the motion." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, n.19 (D.C. Cir. 2004) (noting that "procedural defects in connection with intervention motions should generally be excused by a court" in the absence of a claim of inadequate notice of the grounds for the motion to intervene). With that practice in mind, I look to EBID's pleadings and its statements made during oral argument to determine its claims or defenses for which intervention is sought and to glean the status to which EBID desires to be accorded in these proceedings. Indeed, in declining to append a proposed Complaint in Intervention or other pleading to its motion to intervene, EBID assured that "the motion and brief fully apprised the Court and the parties of EBID's claims and arguments." EBID Reply Brief at 40.

That said, EBID's papers suggest it is adverse to Texas: "Texas' complaint should be dismissed because, contrary to Texas' theory, the Rio Grande Compact does not apportion Rio Grande water to Texas, or apportion such water based on 1938 conditions." EBID Mot. to Intervene at 5. And EBID continues: "[T]o the extent that the Compact was intended to protect Texas' rights in Rio Grande water . . . Texas should be permitted to amend its complaint" to reflect that "Texas' rights were to be protected by agreements between the

United States and [EBID and EPCWID] which allocated water between Rio Grande Project users in New Mexico and Texas." *Id.*; *see also* EBID Mem. in Support at 30-36.

EBID's papers also suggest that it may be adverse to its home State of New Mexico, arguing that New Mexico does not represent EBID's interests because their interests "diverge in . . . highly significant respects," in light of New Mexico's separate action against the United States and EBID, filed on December 20, 2011, in the United States District Court for the District of New Mexico; particularly, EBID asserts a divergence of positions from New Mexico: (i) "concerning the propriety and legality of the Operating Agreement"; (ii) "whether Rio Grande return flows that result from drainage and seepage belong to the Project or instead are public waters subject to appropriation under the laws of New Mexico"; and, more generally, whether (iii) "the dispute between Texas and New Mexico concerning the interpretation of the Compact and the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law." EBID Mem. in Supp. at 24-26; *see also id.* at 36-39.[63]

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[63] EBID also opposes claims made by the United States: "[T]he United States' argument that it is entitled to recover 'hydrologically connected groundwater,' and that such groundwater belongs to the Project and is not available for appropriation under New Mexico law . . . is also misplaced." EBID Mem. in Supp. at 37-38.

Aside from its expressed dissatisfaction in its pleadings with the positions of both parties, EBID plainly stated during oral argument that it has no intention to assert claims against or seek relief from either New Mexico or Texas. *See* Hr'g Tr. 23:20-24, Aug. 20, 2015. Therefore, I find it difficult to determine the purpose for EBID's intervention in this lawsuit and recommend the Court deny the motion to intervene on that basis.

But even if EBID's motion to intervene survives its procedural deficiency, EBID has failed to meet its burden to justify intervention in this original case. Because EBID's home State of New Mexico is already a party to this action, EBID has "the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010).

2. EBID fails to satisfy its burden to establish a compelling interest that is unlike the interests of other citizens of the State

Texas, New Mexico, and the United States all oppose EBID's motion to intervene on grounds that EBID has failed to establish that it has a compelling interest that is not adequately represented by the parties. Texas Opp. at 7-8; New Mexico Opp. at 10-11; United States Opp. at 9. Their arguments on this point are

persuasive. The Complaints filed by the State of Texas and the United States seek: (i) enforcement of the 1938 Compact, which equitably apportioned the waters of the Rio Grande among the three signatory State; (ii) a determination of the rights and duties of the signatory States under the 1938 Compact; and (iii) a determination of the rights of the United States on behalf of the Rio Grande Project and under the Convention of 1906.

EBID states that its compelling interest in this case stems from the fact that it "has entered into contracts with the United States, under which the United States provides the Project water supplies to EBID, which EBID then distributes to the agricultural users in New Mexico." EBID Mot. to Intervene, at 20. EBID states that it "has also entered into contracts with the United States and [the El Paso County Water Irrigation District No. 1] under which EBID operates and maintains diversion structures in the Rio Grande that divert water for both districts." *Id.* Thus, EBID argues, it "has significant responsibilities in effectuating the purposes of the Rio Grande Compact." *Id.* at 21. But, EBID asserts, it "is not a 'water user' similarly situated to other water users in New Mexico and Texas," as it "does not 'use' water at all." EBID Reply Br., at 16. "Rather, EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project's distribution and drainage facilities in New Mexico." *Id.* Its status as an administrator of the Rio Grande Project, EBID asserts, affords it a compelling interest in this

case that is in a class unique from all other citizens or creatures in New Mexico. *Id.* at 17.

But it is actually the United States that has the ultimate right and responsibility to administer the Rio Grande Project. Only the United States possesses the right to divert and store Project water and determine how that water is allocated between EBID and El Paso County Water Improvement District No. 1 under federal reclamation law. Although the United States has transferred ownership of some appurtenant delivery structures to entrymen who have perfected their beneficial-use rights for irrigation under section 6 of the 1902 Reclamation Act, it has not transferred, and cannot transfer, ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without Congressional approval:

> Sec. 6. . . . [W]hen the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.*
>
> . . . .

> Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Act of June 17, 1902, ch. 1093, 32 Stat. 388, 389-90 (codified as amended at 43 U.S.C. §§ 372-373, 498) (emphasis added).

Quite possibly, EBID actually has less of an interest in this case, if any interest at all, than any other affected Rio Grande water user or claimant in New Mexico. EBID does not possess the rights or responsibility under federal reclamation law to carry out the provisions of the Rio Grande Project – the United States has those. And EBID holds no beneficial-use interests; as EBID acknowledges in its papers, the individual entrymen who purchased the land under the Reclamation Act and repaid the United States for the construction and maintenance costs of the irrigation works and the right to use water hold the beneficial-use water rights. *See* EBID Mem. in Support, at 22-23. EBID confirmed during oral argument that it seeks to intervene "as an entity and not on behalf of the individual users." Hr'g Tr. 23:25-24:7, Aug. 20, 2015.

EBID nevertheless compares its "bistate" status to the two entities granted the right to intervene in *South Carolina v. North Carolina*:

> Since EBID administers the Project to ensure water deliveries not only to New Mexico

> but also to Texas and Mexico, and physically delivers Project water to users in Texas, EBID serves bistate interests and not solely intrastate interests in administering the Project. . . . In *South Carolina*, the Supreme Court granted intervention to two non-state entities, CRWSP and Duke Energy, because they served bistate interests. Since EBID serves bistate interests, *South Carolina* supports EBID's right to intervene.

Id. at 22 (internal citations omitted). But even if federal reclamation law or the 1938 Compact were to give EBID some compelling interest in this matter, EBID does not possess the "bistate" qualities that led the Supreme Court to allow CRWSP and Duke Energy to intervene in *South Carolina*. Unlike CRWSP, which was formed as a joint venture with the consent of the two State parties' regulatory agencies, was governed by an advisory board consisting of representatives from counties in both States, drew its revenue from bistate sales, and operated irrigation infrastructure owned by counties in two States, EBID is organized, funded, and governed solely under the laws of New Mexico, and owns and operates irrigation infrastructure located wholly in New Mexico. The "bistate" interests that EBID describes it serves are not actually "bistate"; rather, EBID has merely executed agreements with the United States and El Paso County Water Improvement District No. 1 to deliver Rio Grande Project water it receives from the United States within New Mexico to New Mexico water users and, at times, to provide

infrastructure serving as a pass-through for water destined for Texas. *See* Decl. of Gehrig "Gary" Lee Esslinger, ¶¶ 7, 10, 16-21.[64]

If this case were postured as a "water allocation" case – that is, if Texas had filed a petition requesting

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[64] As EBID explained during oral argument:

> How does Texas get their water? How do we ensure that Texas gets their water? We are the key player in that. We are, in fact, the de facto water master on this system through contract, conveyances from Congress. We are the one that takes the water from the initial release, take it down through.
>
> . . . .
>
> When we received title back, we realized that there were lands in Texas that they could not irrigate and there were lands in New Mexico that we could not irrigate. So we entered into a contract before the final deed was signed that would allow us to go back and forth between Texas and New Mexico, the El Paso district coming up into New Mexico to deliver where we couldn't do that. That's been in operation just prior to the deed being signed by the United States, because the United States wanted something in place that would make sure that that water would be able to be delivered out of state by each irrigation district. I don't know how much more bistate we can become than that.
>
> In answer to your question, I turned to my manager. We deliver to X thousand acres, and the size of those constituents can vary from one-acre tracts to 20-acre farms or 50-acre farms. So it's hard to know how many individuals, because we track by the thousands of acres. And I think in our brief we told you the six-unit – that we irrigate to approximately 6,000 acres in Texas. That number goes up and down depending upon the orders year by year.

Hr'g Tr. 54:11-16; 54:20-55:6, Aug. 20, 2015.

the Supreme Court to make a just and equitable apportionment of the Rio Grande – then perhaps EBID's position as owner and operator of irrigation infrastructure and deliverer of water to end users in New Mexico would accord it a more compelling interest in this action, as the Supreme Court did for Duke Energy's interests in *South Carolina v. North Carolina*. After all, in apportioning an interstate stream between States, the Supreme Court "exercise[s] . . . an informed judgment on a consideration of many factors to secure a just and equitable allocation." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (internal quotations and citations omitted). To make a well-informed apportionment, the Court considers all relevant factors, including

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Id. (quoting *Nebraska v. Wyoming*, 325 U.S. 589 (1945)). Indeed, in equitably apportioning an interstate stream, "there is no substitute for the exercise of an informed judgment and [the Supreme Court] will not hesitate to seek out the most relevant information from the source best situated to provide it." *South Carolina v. North*

Carolina, 558 U.S. 256, 272 (2010) (internal quotations and citations omitted).

But equitable apportionment of the Rio Grande has already been achieved through the States and Congress's ratification of the 1938 Compact. This litigation among quasi-sovereigns asks the Supreme Court to interpret the 1938 Compact and define and enforce those quasi-sovereigns' rights under the 1938 Compact. Therefore, the special considerations justifying Duke Energy's intervention in *South Carolina* are not present here to afford the same invitation to EBID.[65] As it stands, I do not find that EBID has demonstrated a compelling interest that is unlike all other citizens and creatures of the State of New Mexico.

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[65] Nor are the conditions justifying the intervention of private pipeline companies in *Maryland v. Louisiana* present here. The Supreme Court in *Maryland* allowed the intervention of seventeen pipeline companies in a dispute challenging the constitutionality of a tax imposed by Louisiana on the "first use" of any gas imported into Louisiana not already subject to state or federal taxation because, "[g]iven that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy. . . ." 451 U.S. 725, 745 n.21 (1981). EBID's status as a statutory creature of New Mexico contracted to assist the United States in administering the Rio Grande Project in New Mexico affords it no direct stake in this case, which does not concern the administration of the Rio Grande Project or prioritization of the rights of individual water users on the stream.

3. EBID has not rebutted the presumption that New Mexico adequately represents EBID's interests in this litigation

Texas, New Mexico, and the United States all oppose EBID's motion to intervene on grounds that New Mexico adequately represents EBID's interests. Texas Opp. at 10; New Mexico Opp. at 19; United States Opp. at 10. Again, their arguments are persuasive. Compact enforcement actions, such as the one here, are "of such general public interest" that the signatory States to the 1938 Compact are "proper plaintiffs" and, thus, able to invoke the Supreme Court's original jurisdiction. *Texas v. New Mexico*, 482 U.S. 124, 133 n.7 (1987).[66] EBID, by its own admission, is wholly a creature of the State of New Mexico; therefore, pursuant to the doctrine of *parens patriae* and Supreme Court precedent, New Mexico, as a proper party in interest to this original jurisdiction case, is presumed to represent properly EBID's interests in these proceedings. *See South Carolina*, 558 U.S. at 267; *Nebraska v. Wyoming*,

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[66] Indeed, the text of the Eleventh Amendment bars a direct action by citizens against a sovereign State; therefore, "a State may not invoke [the Supreme Court's] original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens." *Kansas v. Colorado*, 533 U.S. 1, 7 (2001); *see also South Carolina v. North Carolina*, 558 U.S. 256, 277-78 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Original jurisdiction is for the resolution of *state* claims, not private claims. To invoke that jurisdiction, a State 'must, of course, represent an interest of her own and not merely that of her citizens or corporations.'" (quoting *Arkansas v. Texas*, 346 U.S. 368, 370 (1953)).

515 U.S. 1, 21 (1995); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Even if EBID were to show a compelling interest unique from other citizens and creatures of New Mexico, it has not rebutted the presumption that New Mexico will adequately represent EBID's interests in this case.

EBID is not a party to the 1938 Compact. The 1938 Compact does not apportion Rio Grande water to EBID and does not impose delivery obligations on EBID. Indeed, the 1938 Compact's "apportionment is binding upon all citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plate River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). But EBID conflates its interests with that of the United States when it states that, because "EBID was created for the purpose of 'cooperating' with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in New Mexico," then "EBID's statutory mission is to ensure the integrity and feasibility of the Project, which serves water users in both New Mexico and Texas." EBID Mem. in Support, at 24. In arguing that New Mexico cannot or will not adequately represent EBID's interests in this litigation, EBID incorrectly asserts that "New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of

the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas." *Id.*

Putting aside the fact that this case centers on the determination of the respective rights and duties of the signatory States under the 1938 Compact and a determination of the rights of the United States on behalf of the Project and the Convention of 1906, EBID's "statutory mission" proceeds directly from the State of New Mexico. EBID concedes it is incorporated pursuant to the laws of New Mexico and is governed by those laws. *See* EBID Mot. to Intervene, at 2; *see also* N.M. STAT. ANN. §§ 73-10-1 to -50.[67] As it explained during oral argument:

> [EBID] operates within the control of the State of New Mexico. New Mexico passed a statute some time ago, obviously, that authorized [EBID] to participate with the United States and cooperate with the United States in operating the project for various functions.
>
> Certainly the New Mexico legislature would have the right, I suppose . . . I assume the New Mexico legislature would have the

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[67] Section 73-10-16 grants EBID's board of directors the right to "enter into any obligation or contract with the United States for the construction, operation, and maintenance of the necessary work for the delivery and distribution of water" from federal reclamation projects or "the board may contract with the United States for water supply under any act of congress providing for or permitting such contract."

> right to step in and terminate [EBID] and provide that it no longer exists and then to take over those functions.
>
> But the point is that the New Mexico legislature has not done that. . . . The New Mexico legislature granted this very carte blanche authority to [EBID] to administer the project. So [EBID] does administer the project independently, but it is always subject to the ultimate control and responsibility of the legislature.

Hr'g Tr. 25:12-26:5, Aug. 20, 2015. Indeed, a prime example of the oversight and control over EBID by the State of New Mexico is the September 18, 1995, "Joint Powers Agreement" that allows EBID to cooperate with El Paso County Water Improvement District No. 1 to operate facilities in either state to manage portions of the Rio Grande Project.[68] To be effective, the State of New Mexico was required to approve and sign the contract. *See* Hr'g Tr. 55:23-56:2; 56:13-22, Aug. 20, 2015.

As a "New Mexico quasi-municipal corporation," EBID Mot. to Intervene, at 2, its interests are imputed

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[68] Days after oral argument, on August 31, 2015, EBID moved the Special Master for leave to file into the record the Declaration of Gehrig ("Gary") Lee Esslinger, which attached and authenticated an agreement dated September 18, 1995, between EBID and El Paso Water Improvement District No. 1, to which the parties referred in oral argument as the "6A-6B" agreement or the "Joint Powers Agreement." [SM Dkt. 35]. I granted leave to file that exhibit into the record on September 4, 2015. *See* Case Mgmt. Order No. 6 [SM R. Doc. 36].

to be those of New Mexico. Misunderstanding the subject of the dispute in this case, EBID states that it holds "divergent positions" from those of New Mexico. *See* EBID Mem. in Support, at 25; EBID Reply Br., at 34.[69] That admission, however, reveals EBID's intention to impeach its own State, which is offensive to the notion of sovereign dignity and prohibited by the doctrine of *parens patriae*. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953). As explained by Chief Justice Roberts:

> This basic principle [that the State represents all of its citizens in an original jurisdiction action] applies without regard to whether the State agrees with and will advance the particular interest asserted by a specific private entity. The State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court. The directive that a State cannot be judicially impeached on matters of policy by its own subjects obviously applies to the case in which a subject disagrees with the position of the State.

South Carolina v. North Carolina, 558 U.S. 256, 280 (2010) (Roberts, C.J., concurring in the judgment in

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[69] The contracts between the United States and the irrigation districts in New Mexico and Texas that are the subject of litigation elsewhere are not at issue here. EBID's responsibility to manage Project deliveries within New Mexico after the United States determines EBID's share of Project water has no effect on how the water is allocated among the States under the 1938 Compact.

part and dissenting in part) (internal quotations and citations omitted).

I find no reason that New Mexico cannot represent EBID's interests in this sovereign dispute; indeed, New Mexico has plainly conveyed that it is able and has the right to represent EBID in this case. *See* Hr'g Tr. 39:16-20, Aug. 19, 2015. And EBID has presented no evidence to rebut the presumption that New Mexico will properly represent EBID's interests here.[70]

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[70] EBID's reliance on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that "a non-state entity may intervene in an original action even though its interest is represented by a sovereign party in the action" is misplaced. EBID Reply Brief at 9. The intervenors in *Arizona* were sovereign Native American tribes, allowed by the Supreme Court to intervene because "at a minimum" they had met the standards for permissive intervention under Rule 24 of the Federal Rules of Civil Procedure. *See* 460 U.S. at 614-15. Because the sovereign Tribes were "independent qualified members of the modern body politic," the Supreme Court held that the intervention standard for nonstate entities in original jurisdiction actions where their interests were already protected identified by the Supreme Court in *New Jersey v. New York*, 345 U.S. 369 (1953) was not applicable. *Id.* at 615 & n.5. EBID, however, is a non-sovereign intervenor whose home state is already a party; therefore, it is subject not to Rule 24 standards, but to the high standard for intervention in an original jurisdiction set forth in *New Jersey v. New York* and *South Carolina v. North Carolina*; that is, EBID has "the burden of showing some compelling interest in its own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented *by the state*." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (emphasis added). Under that standard, the question of whether the United States, as administrator of the Rio Grande Project, can properly represent EBID's interests in this case is irrelevant. There may be no doubt that EBID's interests are perhaps better aligned with El Paso

4. Practical considerations militate against permitting EBID to intervene

As described above, one of the underpinnings forming the basis for the Supreme Court's high standard for intervention by a nonstate entity in an original jurisdiction action is the need for "good judicial administration." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). If EBID, as a creature wholly of the State of New Mexico, is allowed to intervene despite New Mexico's presence in the case, the Supreme Court "could, in effect, be drawn into an intramural dispute over the distribution of water" within New Mexico, and "there would be no practical limitation on the number of citizens . . . who would be entitled to be made parties." *Id.*

Further, the Supreme Court has made clear that "mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of [the Court's] adjudicatory power." *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). That said, the negotiation of a settlement among numerous quasi-sovereign parties to solve complex issues – such as are those pertaining to equitable apportionment of interstate waterways – is difficult at best, as is evidenced

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County Water Improvement District No. 1 than with its home state of New Mexico; however, the standard for intervention identified by the Supreme Court in original actions prohibits a non-sovereign, quasi-municipal entity to intervene specifically to impeach its home state.

by the extended history of the making of the 1938 Compact. The introduction of more parties, particularly those that advance narrower interests that may conflict with the goals of the quasi-sovereign signatory States to the 1938 Compact, may prove fatal to any opportunity for amicable resolution. *See South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) (Roberts, C.J., concurring in judgment in part and dissenting in part) ("[I]ntervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement between the States, if not the power to block a settlement altogether.").

EBID has stated that its "arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in the case." EBID Mem. in Support, at 29. Although the ability or willingness to advance different or alternative theories in a case is not a ground for intervention here, EBID is likely best suited to assist the Special Master and the Court in resolving this matter as an *amicus curiae*. "Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *South Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in judgment in part and dissenting in part) (quotations and citation omitted).

C. Conclusion

For the reasons discussed above, I recommend that EBID's Motion To Intervene be denied. EBID has not met the standard for intervention set forth by the Supreme Court in *South Carolina v. North Carolina*. But intervention is not required to obtain the benefit of EBID's perspective; indeed, I will continue to exercise my procedural authority in this case to ensure the full and fair exposition of the factual and legal issues by encouraging EBID's involvement in this case as *amicus curiae*. *See* Supreme Court Rule 37.1.

VII. El Paso County Water Improvement District No. 1's Motion To Intervene

On April 22, 2015, El Paso County Water Improvement District No. 1 ("EP No. 1") also filed a motion for leave to intervene, attaching a proposed Complaint in Intervention seeking declaratory and injunctive relief that "adopts and incorporates . . . by reference the Complaint in Intervention of the United States." EP No. 1 Compl. in Intervention, at 1. EP No. 1 is "a political subdivision of the State of Texas, created pursuant to the Texas Constitution," and "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as counties and other political subdivisions." EP No. 1 Mem. in Support, at 1-2. "As a beneficiary of the Rio Grande Project, EP No. 1 is a party to the contracts with the United States and EBID for delivery of water from the

Project, including the 2008 Operating Agreement which allocates water as between Project users in New Mexico and Texas." *Id.* at 11. Those contracts allow EP No. 1 to effect Rio Grande Project deliveries within Texas on behalf of Reclamation after that agency determines EP No. 1's share of water pursuant to Reclamation's administration of the Project. "In addition to the water it supplies for irrigation, EP No. 1 furnishes a significant portion of the annual water supply of the City of El Paso." *Id.* at 3. Further, EP No. 1 contends, "[a]s a distributor of Project water, [it] owns, maintains, and operates irrigation infrastructure which crosses and re-crosses the state line to ensure delivery to both New Mexico and Texas users." *Id.* at 12.

But like EBID, EP No. 1 is not a party to the 1938 Compact. Texas seeks no relief directly against EP No. 1 and it is not specifically mentioned in Texas's Complaint, other than the identification of EP NO. 1 as "a political subdivision of the State of Texas [and] the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in Texas." Compl. ¶ 8. Similarly, the United States seeks no relief directly against EP No. 1, and identifies EP No. 1 only as a contractual recipient of Rio Grande Project water. *See* Compl. in Intervention, ¶ 8.

EP No. 1 seeks leave to intervene as a party in this case, despite the fact that its home state of Texas is already a party. EP No. 1 asserts that it has a unique and compelling interest in this case, one that is distinct from other Texas citizens, and one that is not adequately represented by other parties in the case:

> As a beneficiary of the Rio Grande Project, [EP No. 1] has interests in interstate Project water storage and delivery, infrastructure in both New Mexico and Texas, and contracts providing for the allocation of water supply from the Project. [EP No. 1] thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande. No other water user in Texas can claim the kind of direct stake which [EP No. 1] has in the interpretation and enforcement of the Rio Grande Compact. [EP No. 1]'s interests, however, are not adequately represented by any of the current parties to this case.

EP No. 1 Mot. to Intervene, at 2.

On June 10, 2015, Texas, New Mexico, and the United States filed responses opposing EP No. 1's motion; Colorado filed a limited response, refraining from either supporting or opposing EP No. 1's motion, but reserving its right to file a response pending the outcome of the Court's decisions regarding New Mexico's motion to dismiss. On July 10, 2015, EP No. 1 submitted a reply brief in support of its motion and addressing the opposing responses. On October 5, 2015, the Supreme Court referred EP No. 1's motion to intervene to me.

Based upon the pleadings filed by the parties, I recommend that the Court deny EP No. 1's motion for leave to intervene.

A. The Applicable Legal Standard for Intervention

The high standard for intervention in an original action by a nonstate entity established by the Supreme Court requires that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). That standard is discussed fully in Part VI.A, *supra*.

B. EP No. 1 Has Not Met the Standard for Intervention

1. EP No. 1 fails to satisfy its burden to establish a compelling interest that is unlike the interests of other citizens of the State

Texas, New Mexico, and the United States all oppose EP No. 1's motion to intervene on grounds that EP No. 1 has failed to establish that it has a compelling interest that is not adequately represented by the parties. Texas Opp. at 14-16; New Mexico Opp. at 5-18; United States Opp. at 8-10. These arguments are persuasive. The Complaints filed by the State of Texas and the United States seek: (i) enforcement of the 1938 Compact, which equitably apportioned the waters of the Rio Grande among the three signatory States;

(ii) a determination of the rights and duties of the signatory States under the 1938 Compact; and (iii) a determination of the rights of the United States on behalf of the Rio Grande Project and under the Convention of 1906.

EP No. 1 states that its status as "a beneficiary of the Rio Grande Project" serves as the source of its compelling interest in this case. EP No. 1 Mot. to Intervene, at 2. EP No. 1 claims three bases evidencing its alleged unique compelling interest in this case: (1) its interest in the contracts which effectuate the delivery of water obligated to Texas under the 1938 Compact, *see* EP No. 1 Mem. in Supp., at 15; (2) its bi-state interests in the interstate Rio Grande Project, *see id.* at 17-18; and (3) its own water rights in the Rio Grande, *see id.* at 18-24.

As to EP No. 1's first and third bases evidencing a compelling interest: EP No. 1 is a bookend to EBID in that both are contracted by the United States to deliver water to end users, but those contracts do not grant state law water rights to those water improvement districts. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 390 (codified as amended at 43 U.S.C. § 383) ("Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder. . . ."). Only the United States possesses the right to divert and store water in the Project and determine

how water is allocated between EBID and EP No. 1 under federal reclamation law; indeed, the United States itself acquired its water rights via compliance with New Mexico state law. *Id.* ("[A]nd the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ."); *see also* discussion *supra* Part III.C.3. The certificate of adjudication by the Texas Commission on Environmental Quality cited by EP No. 1 recognizes that the source of the water that EP No. 1 is entitled to divert and deliver to water users in Texas is Rio Grande Project water impounded and released in New Mexico by the United States, not EP No. 1. *See* EP No. 1 Mem. in Support, App. 4-5, 10.

In equitably apportioning the waters of the Rio Grande among the signatory States, the 1938 Compact utilizes the Rio Grande Project to deliver Texas's (and part of New Mexico's) equitable apportionment of Rio Grande waters; the contracts between the state water improvement districts and the United States for the management of the Project are not at issue here. Rather, this case centers squarely on the interpretation of the 1938 Compact as to the rights and duties of the sovereign signatory States under the Compact. Therefore, the contracts between EP No. 1 and the United States for the management of the Rio Grande Project do not afford EP No. 1 a compelling interest in this case.

As to EP No. 1's second basis justifying its alleged compelling interest in this case, EP No. 1 compares

itself to the intervening nonstate entities in *South Carolina v. North Carolina*, 558 U.S. 256 (2010), and argues that it also has sufficient "bi-state interests" that would allow it to intervene as a result of its right to store and release water in New Mexico, as well as the fact the Project's irrigation infrastructure "criss-crosses" the state line to provide Project water to irrigators in both New Mexico and Texas. *See* EP No. 1 Mem. in Support, at 17-18. But EP No. 1 is not a bistate entity like those permitted to intervene in *South Carolina*.

As with all water improvement districts in Texas, EP No. 1 is organized, funded, and governed solely under the laws of Texas. *See* TEX. WATER CODE ANN. §§ 55.001-.805. EP No. 1 has no authority to divert or deliver water in New Mexico. EP No. 1 has executed agreements with the United States to deliver Rio Grande Project water it receives from the United States to Texas water users; that ability to contract with the United States is based solely upon a grant of authority from the State of Texas. *See* TEX. WATER CODE ANN. § 55.185. It is the United States that owns and operates the Project's primary dams and storage facilities and determines how water is released and allocated between EBID and EP No. 1 pursuant to the Rio Grande Project. EP No. 1 is simply the "distributor of Project water" to end users in Texas. EP No. 1 Mem. in Support, at 11. And although the United States has transferred ownership of appurtenant delivery infrastructure to those entrymen who have perfected their beneficial-use rights for irrigation under section 6 of

the 1902 Reclamation Act, the infrastructure quitclaimed to EP No. 1 is located completely within Texas. *See* United States' Opp., App., at 9a-35a.[71] On those facts, EP No. 1 has demonstrated no "bistate" interest justifying intervention in this case.

EP No. 1's interest in this case, therefore, extends only to Texas's equitable apportionment of the waters of the Rio Grande, but that interest is not unique. I note for the Court the position of Hudspeth County Conservation and Reclamation District No. 1 ("Hudspeth"), another Texas water improvement district. Hudspeth is located downstream of EP No. 1 and "holds rights to divert water from the Rio Grande based on a permit from the State of Texas, and has the right to receive water from the Project based on its Warren Act contract with the United States." Brief of Hudspeth County Conservation and Reclamation District No. 1 as *Amicus Curiae* in Opposition To New Mexico's Motion To Dismiss, at 4. And I also note the position in which the City of El Paso finds itself, that city maintains a contract with EP No. 1 to receive water from the Rio Grande Project when water is available; otherwise, it is forced to pump groundwater to meet its demands. *See* Brief of *Amicus Curiae* City of El Paso, Texas in Support of Plaintiff's Motion for Leave To File Bill of Complaint, at 3. Both entities

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[71] The United States has not and cannot transfer ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without Congressional approval. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 388, 389-90 (codified as amended at 43 U.S.C. §§ 372-373, 498).

share an interest with EP No. 1 and all other water users in the State of Texas as to Texas's equitable apportionment of the waters of the Rio Grande, one that Texas has filed suit to protect.

On those facts, I do not find that the special considerations justifying the intervention of nonstate entities in *South Carolina* to be present here to afford the same invitation to EP No. 1.

2. EP No. 1 has not rebutted the presumption that Texas adequately represents EP No. 1's interests in this litigation

Texas, New Mexico, and the United States all oppose EP No. 1's motion to intervene on grounds that Texas adequately represents EP No. 1's interests. Texas Opp. at 17; New Mexico Opp. at 18-23; United States Opp. at 10-15. Again, these arguments are persuasive. Even if EP No. 1 were to demonstrate a compelling interest in this litigation to justify intervention, it must also demonstrate that its "interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). By its own admission, EP No. 1 is "a political subdivision of the State of Texas, created pursuant to the Texas Constitution, TEX. CONST. art. XVI, § 59," and is "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing

as counties and other political subdivisions." EP No. 1 Mem. in Support, at 1-2. Thus, pursuant to the doctrine of *parens patriae* and Supreme Court precedent, Texas, as a proper party in interest to this original jurisdiction case, is presumed to represent properly EP No. 1's interests in these proceedings. *See South Carolina*, 558 U.S. at 267; *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). But EP No. 1 has not rebutted the presumption that Texas will adequately represent its interests in this case.

After acknowledging the doctrine of *parens patriae*, EP No. 1 nevertheless contends that its "interests are different from those of the citizens of Texas generally and are not adequately represented by Texas in this case," and alleges that, "[w]hile sharing interests in ensuring New Mexico complies with its Compact obligations, [EP No. 1]'s and Texas'[s] rights and interests are not identical." EP No. 1 Mem. in Support, at 24. But the doctrine of *parens patriae* does not require EP No. 1's interests to be aligned seamlessly with those of its sovereign parent, Texas. Indeed, "[t]he State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court." *South Carolina*, 558 U.S. at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (internal quotations and citations omitted).

EP No. 1 also claims that Texas is not a "specific beneficiary" of the Rio Grande Project and has no intention to defend the terms of the contracts between EP No. 1 and the United States governing the administration of the Rio Grande Project in Texas. EP No. 1

Mem. in Support, at 24-25. Those contentions only highlight EP No. 1's attempt to advance its private interests regarding those contracts, which are not at issue here.

I find no reason that Texas cannot represent EP No. 1's interests in this sovereign dispute; indeed, the very fact that Texas initiated this action demonstrates its willingness and ability to represent and protect EP No. 1's interests, as well as all of the interests of its sister water improvement districts, with respect to the waters of the Rio Grande. EP No. 1 has presented no evidence to rebut the presumption that Texas will properly represent EP No. 1's interests here.[72]

C. Conclusion

For all of the reasons discussed above concerning EBID's motion to intervene, I find that practical considerations also militate against permitting EP No. 1 to intervene. *See* discussion *supra*, Part VI.B.4. I do not disagree with EP No. 1 that this case certainly qualifies as a "unique and complex interstate dispute." EP No. 1 Mem. in Support, at 12. But because EP No. 1 "presents no new questions," EP No. 1 best serves the parties and the Court in this litigation as an *amicus curiae*. *South Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in judgment in part and dissenting in part).

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[72] Because the standard for intervention of nonparties in original actions is rooted firmly in the doctrine of *parens patriae*, the question of whether the United States as an intervenor party would be able to represent the interests of EP No. 1 is irrelevant.

I recommend that EP No. 1's motion to intervene be denied. EP No. 1 has not met the standard for intervention set forth by the Supreme Court in *South Carolina v. North Carolina*. Again, intervention is not required to obtain the benefit of the perspectives of both EBID and EP No. 1, and I will continue to exercise my procedural authority in this case to ensure the full and fair exposition of the issues by encouraging participation in this case by *amici curiae*, to the extent that they bring to the attention of the Special Master relevant matters not directly brought to its attention by the parties. *See* Supreme Court Rule 37.1.

A proposed order is attached hereto as **Appendix D**.

Respectfully submitted,

A. GREGORY GRIMSAL
Special Master
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70170
(504) 582-1111

February 9, 2017

APPENDIX A

76TH CONG., 1ST SESS. – CH. 155 – MAY 31, 1939

AN ACT

Giving the consent and approval of Congress to the Rio Grande compact signed at Santa Fe, New Mexico, on March 18, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to the compact signed by the commissioners for the States of Colorado, New Mexico, and Texas at Santa Fe, New Mexico, on March 18, 1938, and thereafter approved by the legislatures of the States of Colorado, New Mexico, and Texas, which compact reads as follows:

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect. to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado – M. C. Hinderlider

For the State of New Mexico – Thomas M. McClure.

For the State of Texas – Frank B. Clayton

who, after negotiations participated in by S. O. Harper, appointed by the President as the representative of the. United States of America, have agreed upon the following articles, to-wit:

ARTICLE I.

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet.

(l) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II.

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit :

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso ;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall

be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times.

ARTICLE III.

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year, shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

DISCHARGE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Conejos Index Supply (1)	Conejos River at Mouths (2)	Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0	450	232
150	20	500	278
200	45	550	326
250	75	600	376
300	109	650	426
350	147	700	476
400	188		

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortiz and the natural flow of San Antonio River at the U. S. G. S. gaging station at Ortiz, both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U. S. G. S. gaging stations near Los Sauces during the calendar year.

DISCHARGE OF RIO GRANDE EXCLUSIVE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)	Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60	750	229
250	65	800	257
300	75	850	292
350	86	900	335
400	98	950	380
450	112	1000	430
500	127	1100	540
550	144	1200	640
600	162	1300	740
650	182	1400	840
700	204		

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near

Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U. S. G. S. gaging stations near Lobatos, less the discharge of Conejos River at its Mouths, during the Calendar year.

The application of those schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred fifty parts per million.

ARTICLE IV.

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August and

September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station :

DISCHARGE OF RIO GRANDE AT OTOWI BRIDGE AND AT SAN MARCIAL EXCLUSIVE OF JULY, AUGUST AND SEPTEMBER

Quantities in Thousands of Acre Feet

Otowi Index Supply (5)	San Marcia Index Supply (6)	Otowi Index Supply (5)	San Marcia Index Supply (6)
100	0	1300	1042
200	65	1400	1148
300	141	1500	1257
400	219	1600	1370
500	300	1700	1489
600	383	1800	1608
700	469	1900	1730
800	557	2000	1856
900	648	2100	1985
1000	742	2200	2117
1100	839	2300	2253
1200	939		

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U. S. G. S. gaging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs

constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir, to the end that the records at these three stations may be correlated.

ARTICLE V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable or cannot be obtained, at any of the stream-gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with

such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

ARTICLE VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in

storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water m such reservoirs during the year.

ARTICLE VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the

total actual release and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

ARTICLE IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into

the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon

matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners and until any changes in this Compact are ratified by the legislatures of the respective states and consented to

by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV.

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increases or diminution in the delivery or loss of water to Mexico.

ARTICLE XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes.

ARTICLE XVII.

This Compact shall become effective when ratified by the legislatures of each of the signatory States and consented to by the Congress of the United States.

Notice of ratification shall be given by the Governor of each State to the Governors of the other States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory States of the consent of the Congress of the United States.

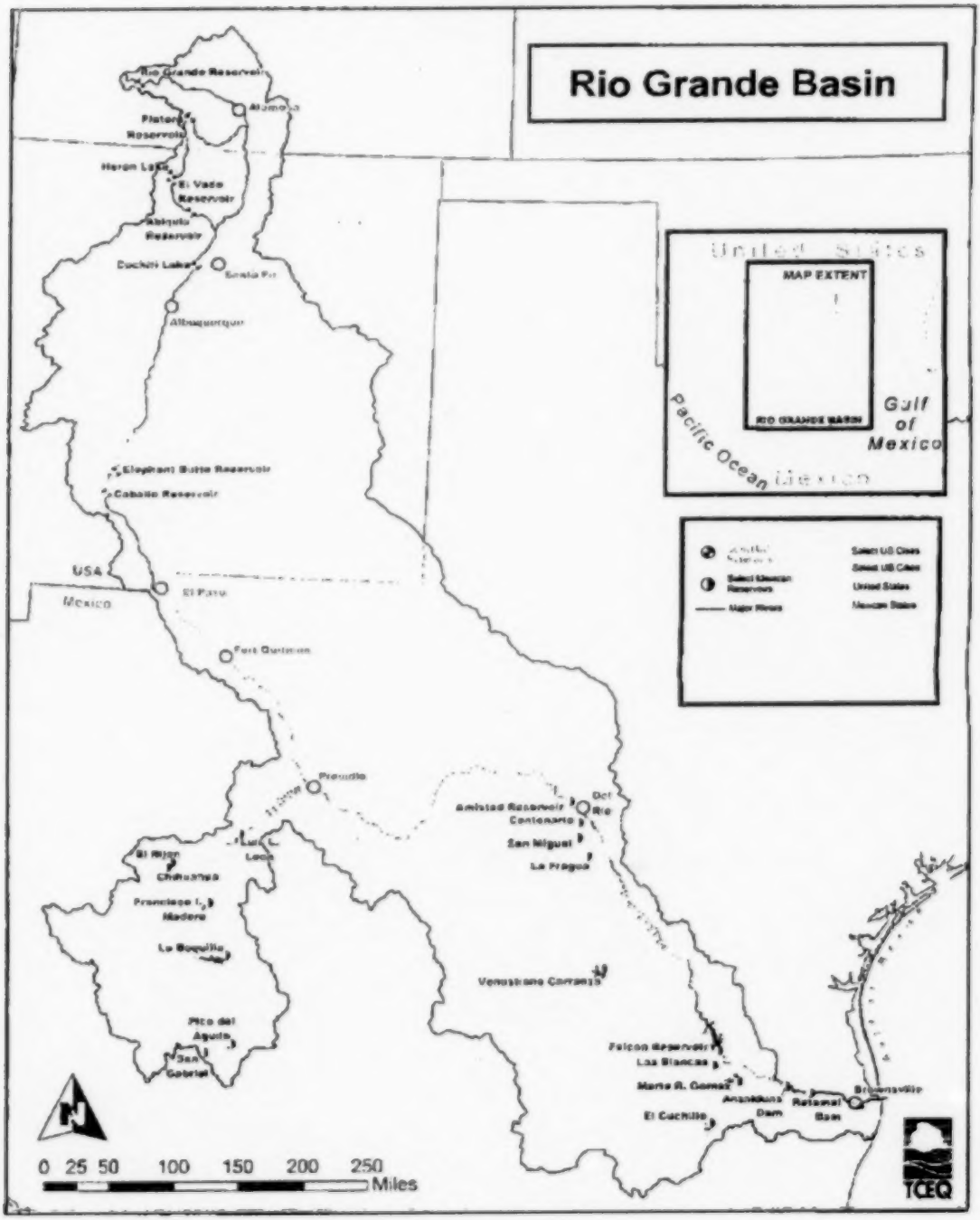
IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

M. C. HINDERLIDER.
THOMAS M. MCCLURE.
FRANK B. CLAYTON.

Approved:
S. O. HARPER.
Approved, May 31, 1939.

APPENDIX B


Rio Grande Basin
Rio Grande Reservoir
Platoro Reservoir
Heron Lake
El Vado Reservoir
Abiquiu Reservoir
Cochiti Lake
Santa Fe
Albuquerque
Elephant Butte Reservoir
Caballo Reservoir
USA
Mexico
El Paso
Fort Quitman
Presidio
Amistad Reservoir
Del Rio
Centenario
San Miguel
La Fragua
El Rijon
Chihuahua
Francisco I. Madero
La Boquilla
Pico del Aguila
San Gabriel
Venustiano Carranza
Falcon Reservoir
Las Blancas
Marte R. Gomez
Anzalduas Dam
Retamal Dam
Brownsville
El Cuchillo
United States
MAP EXTENT
RIO GRANDE BASIN
Gulf of Mexico
Pacific Ocean
Mexico
Select US Cities
Select US Cities
United States
Mexican States
Major Rivers
0 25 50 100 150 200 250
Miles
TCEQ

APPENDIX C

Figure 1

APPENDIX D

PROPOSED ORDER

STATE OF TEXAS v. STATE OF NEW MEXICO AND STATE OF COLORADO

No. 141, Original

_____, 2017

ORDER

Having considered the briefs of the parties and amici curiae in support of, opposition to, or otherwise relating to the Motion to Dismiss filed in this action by the State of New Mexico (dated April 30, 2014), as against the State of Texas' Complaint and the United States' Complaint in Intervention;

Having also considered the briefs of the parties and amici curiae in support of, opposition to, or otherwise relating to the Motion to Intervene filed in this action by Elephant Butte Irrigation District (dated December 3, 2014), and the Motion to Intervene filed in this action by El Paso County Water Improvement District No. 1 (dated April 22, 2015),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The State of New Mexico's Motion to Dismiss the Complaint of the State of Texas is DENIED.

2. The State of New Mexico's Motion to Dismiss the Complaint in Intervention of the United States is GRANTED IN PART to the extent

that the United States cannot state a claim under the 1938 Rio Grande Compact; but said Motion is DENIED to the extent that the United States has stated a claim under federal reclamation law, as to which the Court exercises its original but not exclusive jurisdiction under 28 U.S.C. §1251(b)(2).

3. Elephant Butte Irrigation District's Motion to Intervene is DENIED.

4. El Paso County Water Improvement District No. 1's Motion to Intervene is DENIED.

NO. 141, ORIGINAL.
In the
Supreme Court of the United States
STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,
Defendants.

FIRST INTERIM REPORT OF THE SPECIAL MASTER
DVD Doc. 1 – DVD Doc. 27

No. 141, Original

RECORD AND BRIEFS

FILED
JUL - 9 2017

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

The Albuquerque Bernalillo County Water Utility Authority ("Water Authority") submits this *amicus curiae* brief in support of the State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support dated June 9, 2017 ("New

Mexico's Brief on Exceptions to the First Interim Report"), pursuant to Sup. Ct. R. 37.4.[1] The Water Authority brings to the Court's attention issues not raised in New Mexico's Brief on Exceptions to the First Interim Report, namely: 1) the potential adverse effect on New Mexico's Rio Grande Compact apportionment in the Middle Rio Grande above Elephant Butte Reservoir that results from the Special Master's recommendation for a state line delivery obligation that relies on Texas' allegation of a "1938 condition," and 2) the Special Master's recommendation that New Mexico relinquish State control over water resources, including all surface water and groundwater below Elephant Butte Reservoir.[2] Both recommendations could adversely affect the Water Authority, other water users in the Middle Rio Grande, and have significant consequences in the western United States where U.S. Bureau of Reclamation ("Bureau of Reclamation" or "Reclamation") projects are operated.

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[1] The Water Authority is comprised of the City of Albuquerque, an incorporated New Mexico municipality, Bernalillo County, and the Village of Los Ranchos. All are political subdivisions of the State of New Mexico. While the Water Authority can file an *amicus* brief as of right pursuant to Sup. Ct. R. 37.4 as a "city, county, town, or similar entity," it nonetheless provided notice to all parties of its intent to file an *amicus curiae* brief.

[2] The Water Authority supports the Special Master's recommended disposition of Elephant Butte Irrigation District's Motion to Intervene and El Paso County Water Improvement District No. 1's Motion to Intervene. *See* First Interim Report at 237-77.

INTEREST OF *AMICUS CURIAE*

The Water Authority is the largest provider of municipal water in New Mexico, located in central New Mexico, 150 miles upstream of Elephant Butte Reservoir, in the Middle Rio Grande. The Water Authority is responsible for providing a potable water supply to more than 675,000 people in Albuquerque and Bernalillo County. The Water Authority's drinking water supply comes from two sources. First, it has groundwater wells located in the Middle Rio Grande Underground Water Basin, authorized and administered by the New Mexico State Engineer under Permit No. RG-960 *et al.* Second, it has a perpetual contract for 48,200 acre-feet per year of imported Colorado River water from the San Juan-Chama Project ("SJCP"), a federal Reclamation project, administered under State Engineer Permit No. SP-4830. The Water Authority conjunctively manages its imported SJCP surface water with its groundwater. The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under the Rio Grande Compact, including river operations of the Middle Rio Grande Project for irrigation of lands within the Middle Rio Grande Conservancy District ("MRGCD").[3] The Water Authority's drinking water supply, in fact, all water use in the Middle Rio Grande, is dependent on continued Rio Grande Compact accounting and

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[3] The Middle Rio Grande Project is a Bureau of Reclamation project that includes storage in El Vado Reservoir on the Rio Chama that provides water for irrigation of approximately 60,000 acres in the Middle Rio Grande.

administration in the Middle Rio Grande as it has been done historically and New Mexico State Engineer jurisdiction over its surface water and groundwater supplies.

BACKGROUND

1. Rio Grande Compact.

The Rio Grande was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). Three separate and distinct river segments are considered for purposes of Rio Grande Compact administration in New Mexico. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372. The Upper Rio Grande is from the Colorado-New Mexico state line to Otowi Gage. The Middle Rio Grande is from Otowi Gage to Elephant Butte Reservoir. The Lower Rio Grande runs from Elephant Butte Reservoir to the New Mexico-Texas state line.

Pursuant to Article III of the Rio Grande Compact, Colorado is obligated to deliver a percentage of the recorded upstream inflows to a gaging station near Lobatos, CO, near the Colorado-New Mexico state line.

Article IV, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined from a supply index from inflow

recorded at a gaging station at Otowi, New Mexico. The Resolution adopted at the Compact Commission meeting on February 14-16, 1949, changed New Mexico's point of delivery from San Marcial to Elephant Butte Reservoir, and revised the measurement of deliveries in Article IV. One significant element of the Rio Grande Compact is that New Mexico in the Middle Rio Grande is entitled to use of the tributary inflows between Otowi Gage and Elephant Butte Reservoir. This means that the amount of water available for use in the Middle Rio Grande is not strictly related to the year to year variation from the supply index at Otowi Gage but also by the amount of tributary inflow which varies from year to year.

Under Article VI of the Compact, the upstream states of Colorado and New Mexico are allowed to accrue debits and to erase Compact debits by an "actual spill" at Elephant Butte Reservoir. Colorado can accrue 100,000 acre-feet of debits and New Mexico can accrue 200,000 acre-feet of debits. An "actual spill" erases debits and re-starts Compact accounting.

The balance of agricultural, municipal, and interstate interests is held together by these key provisions of the Rio Grande Compact. The apportionment set forth in the Rio Grande Compact gives considerable latitude to the upstream states in terms of managing annual deliveries. Articles III, IV, and VI provide significant flexibility in Compact operations. The Compact does not impose specific, fixed delivery obligations independent of river conditions and the two upstream states are not penalized by shortfalls in individual

years. Instead, Article IV provides a highly flexible apportionment that reflects inflow in any given year in New Mexico, and sets its delivery obligation accordingly. Article VI permits the upstream states to accrue debits instead of being charged for a yearly underdelivery. The Compact has operated successfully under long periods of debits, *i.e.*, between the actual spills of 1942 and 1985. *See generally* S.E. Reynolds, Phillip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 N.R.J. 201 (1974).

There is nothing in Articles III, IV, or VI of the Rio Grande Compact, or the Compact's historical administration, that suggests Colorado or New Mexico have a fixed delivery obligation. In fact, the Rio Grande Compact gives a highly flexible apportionment to the Middle Rio Grande as demonstrated by 80 years of actual Compact accounting and administration.

2. Water Administration in the Middle Rio Grande.

The Water Authority is located in the Middle Rio Grande. The Middle Rio Grande contains important components of New Mexico's economy including the cities of Albuquerque, Santa Fe, Rio Rancho, Espanola, Belen, and Socorro, and the communities of Bernalillo and Los Lunas. Straddling the Rio Grande is the MRGCD, a quasi-State entity which was rehabilitated by the Bureau of Reclamation in the 1950s.

The New Mexico State Engineer has jurisdiction over all surface water in New Mexico, including the Middle Rio Grande, by virtue of the surface water code of 1907. *See* NMSA 1978, § 72-1-1 (1907); NMSA 1978 §§ 72-5-1 *et seq.* (1907). Prior to the adoption of the surface water code, acquisition and use of surface water was governed by the common law of prior appropriation.

By virtue of the groundwater code of 1931, the New Mexico State Engineer acquires jurisdiction over groundwater only when he has "declared" an underground water basin having reasonably ascertainable boundaries. *See* NMSA 1978, §§ 72-12-1 *et seq.* (1931). Prior to the declaration of a groundwater basin, the acquisition and use of groundwater was also governed by the common law. The result of the groundwater code is a patchwork of groundwater basins throughout New Mexico with different inception dates on which the groundwater basin was declared. The Rio Grande Underground Water Basin, extending from Taos to Elephant Butte Reservoir, was declared by the New Mexico State Engineer on November 29, 1956.

The native Middle Rio Grande water supply is augmented with imported surface water from the San Juan River, a tributary of the Colorado River, by the San Juan-Chama Project, 43 U.S.C. §§ 615 *et seq.* The SJCP is a Bureau of Reclamation project that imports a portion of New Mexico's Colorado River allocation from diversions in Colorado which are conveyed into New Mexico through a series of tunnels for ultimate storage in Heron Reservoir. Heron Reservoir is located

on the Rio Chama, a tributary to the mainstem Rio Grande, and has a storage capacity of 401,000 acre-feet. Stored Colorado River water is released from Heron Reservoir to the SJCP contractors on an annual basis in accordance with contracts. The Water Authority stores a portion of its SJCP allocation in Abiquiu Reservoir, 40 miles downstream of Heron Reservoir, for release and use within the City of Albuquerque and Bernalillo County. Imported water is the private property of the importer. *See Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, 320 P.3d 492. SJCP water is owned by the Water Authority, other municipalities, MRGCD, and various Indian tribes.

There are three reservoirs in New Mexico located upstream of the supply index gage at Otowi. From highest elevation to lowest elevation they include Heron Reservoir (401,000 acre-feet capacity) which provides storage exclusively for imported SJCP water, El Vado Reservoir (198,000 acre-feet capacity) which provides storage for Middle Rio Grande Project native Rio Grande water and SJCP water when space is available, and Abiquiu Reservoir which is a U.S. Corps of Engineer flood control reservoir that allows for storage of SJCP water (200,000 acre-feet capacity). All the reservoirs are considered post-1929 reservoirs for the purpose of Rio Grande Compact administration (Articles VII and VIII), although currently only El Vado Reservoir stores native Rio Grande water.

3. Texas' Complaint.

Texas' Motion for Leave to File Complaint, Jan. 2013 ("Texas' Complaint") is premised on the theory that Texas entered into the Rio Grande Compact under the fundamental premise that "the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact. . . ." Texas' Complaint at ¶ 11. Texas acknowledges that "[t]he Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation." *Id.* at ¶ 10. Texas nevertheless asserts that the Compact:

> [R]elied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.

Id.

Texas then imputes this theory to the Compact, although by its plain terms Article IV requires deliveries into Elephant Butte Reservoir, not at the state line. *Id.* at ¶ 13. The key "credits and debits" clause in Article VI of the Compact is alluded to in ¶ 14 of Texas' Complaint, but its significance is ignored, likely because historical Compact administration does not

square with the allegations in Texas' Complaint. *Id.* at ¶ 14.

The crux of Texas' Complaint is that "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact." *Id.* at ¶ 18. A critical assumption in Texas' case theory is that "[t]he Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *Id.* In other words, Texas is claiming that implied in the Rio Grande Compact is a fixed state line delivery based upon a "1938 condition." Texas claims that:

> New Mexico, through the actions of its officers, agents, and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico.

Id.

Texas does not address the disconnect between imputing a fixed delivery obligation below Elephant Butte Reservoir based upon an implied "1938 condition" with the variable annual deliveries allowed under Article IV of the Compact and the system of debits and credits provided under Article VI of the Compact.

4. The United States' Complaint in Intervention.

The United States sought intervention on the grounds that "distinctively federal interests, best presented by the United States itself, are at stake," citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). *See* Motion of the United States for Leave to Intervene as a Plaintiff, Feb. 2014 ("United States' Motion for Leave to Intervene") at 1-2. The United States summarized its interests as concerning "water released by the Rio Grande Project (Project), a Bureau of Reclamation project that the Department of the Interior operates, including by setting the diversion allocations for water users who have contracts for delivery of Project water." *Id.* at 2. The United States asserted that its "interest in how the Project is operated is a distinctively federal interest that is best presented by the United States." *Id.* The United States framed its interest under the Rio Grande Compact by stating: "[t]he Court's interpretation of the parties' rights and obligations under the Compact would affect how the Bureau of Reclamation calculates those diversion allocations." *Id.*

The United States further claimed "a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries. . . ." *Id.* The United States' Complaint in Intervention states:

> 12. Only persons having contracts with the Secretary may receive deliveries of water, including seepage and return flow, from a Reclamation project. See, *e.g.*, 43 U.S.C. 423d, 423e, 431, 439, 461. Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary.

See United States' Complaint in Intervention, Feb. 2014 ("United States' Complaint in Intervention") at ¶ 12.

Combining its claim that all groundwater and surface water below Elephant Butte Dam is Rio Grande Project water with its assertion that anyone using Project water must have a federal Reclamation contract, the United States seeks to federalize the Lower Rio Grande in New Mexico, *i.e.*, allocate and administer all groundwater and surface water below Elephant Butte Reservoir.

5. First Interim Report of the Special Master.

The First Interim Report of the Special Master was issued on February 9, 2017 ("First Interim Report"). The Special Master recommended denial of New Mexico's Motion to Dismiss Texas' Complaint and the granting of New Mexico's Motion to Dismiss the United States' Complaint in Intervention. Nevertheless, he recommended that the United States be granted leave to participate pursuant to 28 U.S.C. § 1251(b)(2) under the Court's discretionary, non-exclusive original

jurisdiction to pursue claims under federal Reclamation law.

The First Interim Report consists of three primary sections that are addressed herein. The first is an extensive recitation of factual findings, citations from the historical record, quotations from secondary sources, and conclusions of law reached by the Special Master. First Interim Report at 9-187. These involve the history of Compact negotiations, the intentions of individual Compact negotiators, and the nature of the apportionment created by the Rio Grande Compact, initially in 1929 with the interim compact of 1929, and ultimately in 1938 with the ratification of the final Compact. *Id.*

Next, the First Interim Report adopted Texas' contention that there is a tacit apportionment made by the Rio Grande Compact that requires deliveries at the state line, impliedly in a "1938 condition," not at Elephant Butte Reservoir as stated in Article IV of the Compact and as historically administered by the Rio Grande Compact Commission. *Id.* at 187-217. As described in Point II, *infra*, this creates a second apportionment in the Lower Rio Grande that could undermine the Article IV apportionment in the Middle Rio Grande and conflicts with the debits and credits provision of Article VI.

Finally, the First Interim Report addresses the United States' Complaint in Intervention insofar as it alleges that all groundwater and surface water below Elephant Butte Reservoir are Project water. *Id.* at

217-37. According to the United States' Complaint in Intervention, any New Mexican who uses groundwater or surface water from Elephant Butte Reservoir down to the New Mexico-Texas state line must first obtain a contract with the federal government. The result is that the United States, not New Mexico, would administer all groundwater and surface water below Elephant Butte Reservoir.[4]

SUMMARY OF ARGUMENT

None of the parties have addressed the potential impact of the recommendations in the First Interim Report on administration of the Rio Grande Compact upstream of Elephant Butte Reservoir and potential further usurping of New Mexico's jurisdiction to administer water in the Middle Rio Grande. The Water Authority addresses those issues herein.

First, contrary to Fed. R. Civ. P. 12, the Special Master used extensive materials outside the record to make his recommendations on New Mexico's Motions to Dismiss, without having afforded New Mexico the opportunity to respond. *See infra* Point I.

[4] While the United States' Complaint in Intervention alleges that New Mexico has allowed diversions of surface water and hydrologically connected groundwater below Elephant Butte Reservoir, for practical purposes this equates to nearly all groundwater in New Mexico below Elephant Butte Reservoir because of the existing hydrologic connection of even deep stored groundwater.

Second, in recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master failed to recognize that both the "plain meaning" and the historical record he cited preclude a fixed delivery obligation or a second apportionment below Elephant Butte Reservoir based on an alleged "1938 condition" delivery obligation. *See infra* Point II. The apportionment mechanisms in Articles IV and VI were designed to preclude a "1938 condition" under the Rio Grande Compact that requires a fixed delivery obligation. A fixed delivery obligation at the New Mexico-Texas state line could very well implicate the delivery obligations upstream of Elephant Butte Reservoir, including the administration of the Rio Grande under Articles III, IV, and VI of the Compact. Said differently, a fixed downstream delivery obligation is incompatible with a flexible upstream delivery obligation. A fixed delivery obligation at the New Mexico-Texas state line based upon a "1938 condition" threatens to upend the delivery obligations in Articles III and IV of the Compact and the debits and credits provision of Article VI, contrary to historical Compact administration and accounting and to the detriment of the Water Authority and the Middle Rio Grande.

Third, with respect to its Complaint in Intervention, the United States goes significantly beyond Texas' Complaint and seeks federalization of the Rio Grande below Elephant Butte Reservoir, claiming it should administer all surface water and groundwater in that river reach through federal contracts. *See infra* Point III. While finding that the United States has not

stated a cause of action under the Rio Grande Compact, the Special Master nonetheless recommends that the United States be allowed to pursue federal Reclamation claims under the Court's discretionary, non-exclusive original jurisdiction, something that is almost never allowed. *See* 28 U.S.C. § 1251(b)(2). His recommendation risks a federalization of the entire Rio Grande, with all surface water and hydrologically connected groundwater users in New Mexico being regulated by the United States when a federal Reclamation project is implicated. This is contrary to *California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978) which hold that states have plenary control over the waters within their borders. The United States' argument and the Special Master's recommendation in this regard place the Water Authority's groundwater rights obtained under state law at risk.

ARGUMENT

POINT I

THE FIRST INTERIM REPORT SHOULD BE REJECTED FOR RELYING ON EXTRINSIC EVIDENCE FOR WHICH NOTICE AND OPPORTUNITY TO RESPOND WERE NOT GIVEN

New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention, Apr. 2014 ("New Mexico's Motion to Dismiss") is governed

by Fed. R. Civ. P. 12(b)(6).[5] With respect to Texas' Complaint, New Mexico's Motion to Dismiss asserted that no claim had been stated under the Rio Grande Compact requiring New Mexico to deliver Texas' water to the New Mexico-Texas state line, and that "[t]he Compact does not require New Mexico to maintain depletions within the Rio Grande Basin in New Mexico below Elephant Butte at the levels existing as of 1938." *See* New Mexico's Motion to Dismiss at 1.

With respect to the United States' Complaint in Intervention, New Mexico alleged that no claim had been stated under the Compact because "[t]he Compact imposes no affirmative duty on New Mexico to prevent interference with deliveries of Rio Grande Project ("Project") water by the United States. Nor can the United States, which is not a party to the Compact, assert claims based on the Compact." *Id.*

In neither case did New Mexico argue that it can release water from Elephant Butte Reservoir and "grab it back" before it gets to Texas. First Interim Report at 202. Instead, New Mexico relies on state and federal law that apply to the administration of water for Bureau of Reclamation projects, including

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[5] Pursuant to Sup. Ct. Rule 17.2 for Procedure in an Original Action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." *Ibid.*

the administration of return flows and seepage, to supplement Project supply.[6]

A complaint must "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This applies to the factual allegations of a complaint. It requires "some minimal factual exposition sufficient to state a claim that is 'plausible on its face' in order to survive a motion to dismiss." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE, § 12.34[1][a] (3d ed. 2017). When the Court considers matters outside the pleadings, the motion is converted into one for summary judgment. As set forth below, this entails the requirement of notice to the parties and opportunity to respond. The anomaly with respect to the First Interim Report is the extensive research into primary archival and secondary sources that was undertaken by the Special Master on his own. *See* First Interim Report at 9-187. Much of the substantive historical and factual research used by the Special Master in the recommendation section of the First Interim Report is selective, incomplete, and subject to contrary conclusions. *Id.* at 187-237.

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[6] The Special Master's recommendation has the potential to aid the United States in yet another case of a federal water grab in which the United States is attempting to usurp control of state water resources. *See, e.g.*, *United States v. New Mexico*, 438 U.S. 696 (1978); *California v. United States*, 438 U.S. 645 (1978); *United States v. Nevada*, 463 U.S. 110 (1983); proposed EPA and COE *"Waters of the United States Rule,"* 79 Fed. Reg. at 22,198; *Nat'l Ski Areas Assoc., Inc. v. United States Forest Service, et al.* (D. Colo., No. 12-CV-00048-WJM, Dec. 19, 2012).

The First Interim Report begins with an exhaustive review of archival documents, evidence from the Compact negotiations, law review articles, and other secondary sources including Douglas R. Littlefield's treatise *Conflict on the Rio Grande: Water and the Law, 1879-1939* (Univ. of Calif. Press 2008).[7] The Index of Material Provided on DVD contains 27 documents. *See* First Interim Report at vii-xiii. Other source material, cited as authority, is indexed. *Id.* at xxviii-xlix. This evidence had not been submitted by the parties. Moreover, the documents provided on DVD constitute only a portion of the source material cited in the Table of Authorities.

The First Interim Report cites *Arizona v. California*, 373 U.S. 546, 552 (1963) as if it were comparable. It is not. *Arizona v. California* was a case to determine Arizona's share of the apportionment made by the Colorado River Compact. The development of the "meaning and scope" of the Colorado River Compact referred to by the Special Master was part of a trial process lasting two years "during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled." 373 U.S. at 551. Critically, admissible evidence was governed by the Federal Rules of Evidence. Post-trial proceedings lasted three years. As the Court explained:

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[7] The significant extent of independent research and collection of historical documents related to the Rio Grande Compact and its administration performed by the Special Master, including independent factual research at various archives, is described in detail in his petitions for fees filed with the Court.

"Following many motions, arguments, and briefs, the Master, in a 433-page volume, reported his findings, conclusions, and recommended decree. . . ." *Id.* This extensive fact finding and post-trial briefing process bears no resemblance to this 12(b)(6) motion to dismiss.

> The Special Master nevertheless states that:
>
> [C]onsistent with *Arizona v. California*, 373 U.S. 546, 552 (1963), this report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report.

First Interim Report at 193. As shown from those portions of the First Interim Report addressed in this brief, the authority cited by the Special Master in support of his conclusions and analyses suggests otherwise. *Id.* at 198-217.

Under Fed. R. Civ. P. 12(b)(6): "[i]n deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2017); *see, e.g.*, *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 820 (5th Cir. 2012); *Luis v. Zang*, 833 F.3d 619, 632 (6th Cir. 2016). Typically, "once the court

decides to accept 'matters outside the pleadings,' the motion will be treated as one for summary judgment and disposed of as provided in Rule 56." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][a] (3d ed. 2017). The purpose of this is to ensure that "'all parties' are 'given a reasonable opportunity to present the material that is pertinent,' to a Rule 56 summary judgment motion." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][b] (3d ed. 2017). Moore explains that the purpose:

> is that the court must make sure that the parties know that the court is considering rendering a summary judgment in the matter. In addition, the court must give the parties a fair opportunity, a reasonable amount of time, to assemble summary judgment affidavits and other supporting and opposing materials and present them to the court.

Id.; *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287-89 (3d Cir. 1999); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2d Cir. 1990).

In recommending denial of New Mexico's Motion to Dismiss, the Special Master stated that "[u]nder Rule 12(b)(6), all factual allegations contained in Texas's Complaint and the United States' Complaint in Intervention are assumed to be true. [citing] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)." First Interim Report at 191. The Special Master then proceeded to analyze Texas' Complaint and the apportionment created by the Rio Grande Compact. *Id.* at 194-217. He reached

several conclusions set forth in the First Interim Report headings, most of which relied on matters which were beyond the four corners of the complaint. These include the findings that: "Texas has stated a claim under the unambiguous text and structure of the 1938 Compact" (*id.* at 194-95); "[t]he structure of the 1938 Compact integrates the Rio Grande Project wholly and completely. . . ." (*id.* at 198-203); and "[t]he purpose and history of the 1938 Compact confirm the reading that New Mexico is prohibited from recapturing water it has delivered to the Rio Grande Project after Project water is released from the Elephant Butte Reservoir" (*id.* at 203-09).

These conclusions, however, are not clear or "unambiguous." They do not reflect the "plain meaning" of unambiguous Compact provisions. Instead, these conclusions are reached by use of extrinsic evidence. For example, the sections on "the purpose and history of the 1938 Compact" uses five extrinsic documents from the DVD. First Interim Report at 203-09. These conclusions contradict the Special Master's cited authority that "[a] compact's express terms are 'the best indication of the intent of the parties,' [citing] *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) [quoting] *Montana v. Wyoming*, 131 S. Ct. 1765, 1771-72 & n.4 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1979))." First Interim Report at 193.

Because the First Interim Report relies extensively on extrinsic factual evidence developed independently by the Special Master from outside the

record, for which response should have been allowed, the parties and *amici* must now respond and it requires rejection of the First Interim Report by the Court, except as set forth *supra* at n.2.

POINT II

THE EFFECT OF A DELIVERY OBLIGATION BELOW ELEPHANT BUTTE RESERVOIR ON THE APPORTIONMENT IN THE MIDDLE RIO GRANDE HAS NOT BEEN CONSIDERED

The Special Master concludes that "the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." First Interim Report at 197. He asserts that New Mexico "disregards the text of Article IV and renders the common and straightforward meanings of the terms 'obligation' and 'deliver' in Article IV void" by allowing downstream diversions after the Compact water has been released from Elephant Butte Reservoir. *Id.* This necessarily equates to a state line delivery obligation. Combined with Texas' contention that New Mexico could make no additional depletions beyond those that existed when the Compact was entered, the result, if accepted by the Court, would be an interpretation of the Compact that would require a state line delivery obligation based upon a "1938 condition." *See* Texas' Complaint at ¶ 18.

The conclusion reached by the Special Master is not contemplated in the Compact which apportions water on the bases of Articles IV and VI in the Middle Rio Grande and Upper Rio Grande. In fact, a fixed delivery obligation below Elephant Butte Reservoir will have repercussions in the Middle Rio Grande.

The Water Authority is concerned about potential adverse changes in Rio Grande Compact administration and accounting upstream in the Middle Rio Grande, because it is not clear how New Mexico can make a fixed state line delivery based upon a purported "1938 condition" and keep a flexible delivery obligation upstream as contemplated and historically administered under Compact Articles III, IV, and VI.

A. The Rio Grande Compact does not contain a state line delivery obligation.

Under Article IV of the Rio Grande Compact, New Mexico is required to deliver an amount of water that is determined by a schedule that varies from year to year with the amount of water in the Rio Grande at the Otowi Gage. The "plain meaning" of Article IV is that New Mexico's obligation is "to deliver water in the Rio Grande into [Elephant Butte Reservoir] during each calendar year [which] shall be measured by that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station: . . . ." *See* Rio Grande Compact Article IV. The table in Article IV then shows the

relationship between inflow measured at Otowi Gage and outflow required at the point of delivery measured in thousands of acre-feet. *Id.* The express language in Article IV constitutes the "plain meaning" of New Mexico's delivery obligation. There is no language in the Compact for a state line delivery obligation corresponding to a "1938 condition."

Articles IV, VI, VII, and VIII do not mention or reference the administration of releases into the Lower Rio Grande. Each is concerned with restrictions on diversion of Rio Grande water upstream of Elephant Butte Reservoir. Article IV sets the delivery obligation at Elephant Butte Reservoir based upon inflows at Otowi Gage. Article VI, the "credits and debits" provision, provides flexibility to the two upstream states to meet delivery obligations under variable river flow conditions. Colorado can accrue up to 100,000 acre-feet of debits; New Mexico can accrue up to 200,000 acre-feet of debits. In practice, during the extended period of debit administration between 1943-1985, Colorado accrued 939,900 acre-feet of debits by December 31, 1965, and New Mexico accrued 420,000 acre-feet of debits by the end of 1966. *See* Complaint and Colorado Answer in *Texas and New Mexico v. Colorado*, No. 29, Original. That accounting applied to water diverted in Colorado's San Luis Valley and New Mexico's Middle Rio Grande. It had nothing to do with the Lower Rio Grande. These Compact provisions, focused upstream of Elephant Butte Reservoir, have provided for the administration of state-based water rights under the Rio

Grande Compact for 80 years and New Mexico's obligation under the Compact. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

The key documents appended to the First Interim Report show that Texas' negotiators in 1938 sought to include an express apportionment of released water below the Reservoir but ultimately rejected this approach because a separate division of released water was effectuated by Bureau of Reclamation contracts apart from the Rio Grande Compact.[8] This rendered an apportionment of water released from Elephant Butte Reservoir unnecessary in Texas' view. Accordingly, no state line apportionment was made in the Compact and one should not be imputed now. *See Conflict on the Rio Grande, Water and the Law, 1879-1939,* Littlefield, D.L., at 213-14.

The issue arose during the negotiations by Texas' concern that there was no language in the Compact which assured that Texas would get any water. Writing to Frank Clayton, Rio Grande Compact Commissioner for Texas in 1938, Sawnie B. Smith, an attorney representing the Water Commission Association of the Lower Rio Grande Valley, stated that the proposed Rio Grande Compact "makes no provision for the division

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[8] Rather than have the Special Master research the historical record and reach his own conclusions about the history of Compact negotiations, a more common practice is for expert historians to undertake this research in which they have education and training and present their opinions to the Special Master at trial under the Federal Rules of Civil Procedure. *See Kansas v. Colorado*, No. 105, Original, and *Nebraska v. Wyoming*, No. 108, Original.

of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled." Letter from Sawnie B. Smith to Frank B. Clayton, Sept. 29, 1938, Box 2F466, Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, Univ. of Texas at Austin (DVD Doc. 25). Smith considered that this omission was "too obvious to have been inadvertent, and, therefore, unquestionably, the Commissioners had what they considered valid reason for it." *Id.* Smith nevertheless wanted an explanation of "why the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms." *Id.* In reply, Clayton explained that the negotiators for the Rio Grande Compact had recognized an existing division of the waters between New Mexico and Texas through the allocation made by the Bureau of Reclamation. Clayton stated: "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation." Letter from Frank B. Clayton to Sawnie B. Smith, Oct. 4, 1938, Box 2F466, Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, Univ. of Texas at Austin (DVD Doc. 26). He continued: "[b]y virtue of the contract recently executed [the 1938 inter district agreement], the total area is 'frozen' at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a 'cushion' of three per cent. [sic] for each figure." *Id.*

The Special Master incorrectly concluded that the Rio Grande Compact requires a state line delivery, with consequences to the Middle Rio Grande.

B. There is no delivery obligation pursuant to a "1938 condition."

Texas argues that the "1938 condition" should be imposed on New Mexico as it relates to a purported delivery obligation at the state line because "[t]he Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *See* Texas' Complaint at ¶ 18. As set forth above, the basis for this is flawed because the Rio Grande Compact and the Rio Grande Project are not interchangeable and the obligations within them are separate and distinct. The Special Master recognizes this distinction because he recommended that the United States' Complaint in Intervention not be allowed under the Court's original jurisdiction in relation to Rio Grande Compact claims, but instead, recommended that the United States be allowed to pursue claims under federal Reclamation law pursuant to the Court's discretionary, non-exclusive original jurisdiction. *See* First Interim Report at 217-37.

The Rio Grande Project utilizes the stored water in Elephant Butte Reservoir to deliver irrigation water to the two Project beneficiaries, namely the New Mexico irrigation district, Elephant Butte Irrigation

District ("EBID"), and the Texas irrigation district, El Paso County Water Improvement District No. 1 ("EP No. 1"). The Rio Grande Compact obligation ends at the delivery point which is Elephant Butte Reservoir. The obligation to deliver water from Elephant Butte Reservoir to EBID and EP No. 1 resides in the contracts between the parties and the operator of the Rio Grande Project, namely the United States.

The purported "1938 condition" arises out the original contract arrangement between the three parties in which the irrigated acreages were used to divide the available supply between EBID and EP No. 1, 57% and 43% respectively. As historical Compact administration makes clear, however, there is no "1938 condition."

Texas contends a "1938 condition" applies to New Mexico, although Texas' own actions have changed this purported baseline many times, demonstrating that such a delivery obligation does not exist. First, Texas has allowed groundwater pumping for the City of El Paso and others which affects the Rio Grande in both New Mexico and Texas. While Texas has alleged that groundwater pumping in New Mexico has depleted Project supplies, the same can be said of Texas.

Second, EP No. 1 has transferred water from irrigation to municipal use for the City of El Paso. If the Rio Grande Project requires that deliveries be made based on irrigation demands, then reduction in irrigation demands due to the transfer of that water to

municipal use is a change from the supposed "1938 condition."[9]

Third, Texas completed its own state adjudication of water rights in 2007 which accounted for uses that were not present in 1938 and therefore has changed both the river and the stream connected groundwater in Texas. The United States agreed to the Texas adjudication, but it is not clear whether that agreement included acceptance of additional depletions, thereby changing the amount of water released from Elephant Butte Reservoir to meet EP No. 1's irrigation demands after 2007 as compared to the alleged "1938 condition." Given the significant increase in groundwater use in Texas, it is highly likely that it did result in a change to the Elephant Butte Reservoir release quantity.

Finally, the 2008 Operating Agreement, which was agreed to among the United States, EBID, and EP No. 1, uses a regression analysis to determine annual allotments between the two irrigation districts which is based on 1951-1978 hydrologic conditions. *See* United States' Memorandum in Support of Motion to Intervene as a Plaintiff, Feb. 2014 ("United States' Memorandum in Support") at 5-6. Clearly, the 1951-1978 hydrologic conditions are not "1938 conditions." While

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[9] The Water Authority understands that water rights for agricultural purposes can be transferred to municipal purpose but the amount transferred is typically the consumptive use portion of the water right and therefore there is still some portion needed to convey the water through the irrigation system. Moreover, a departure in the purpose of use in Texas from irrigation to municipal use is a change in the purported "1938 condition."

contending on one hand that it continues to follow the 1938 diversion allocations of 57% for EBID and 43% for EP No. 1, the United States admits the opposite is true: "[t]he effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico." *Id.* at 6. If EBID has reduced allocations, as the United States admits, there is necessarily a change in the "1938 condition."

The significant departure from the claimed "1938 condition" is further illustrated in the Final Environmental Impact Statement for the 2008 Operating Agreement. *See Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* (U.S. Bureau of Reclamation, Sept. 30, 2016) (https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf). In that document, the Bureau of Reclamation finds that EBID's allocation would provide an average of 314,327 acre-feet per year under the no action alternative (current allocation accounting) versus an average of 213,110 acre-feet per year if the 2008 Operating Agreement accounting procedures are adopted. *Id.* at iii. Conversely, EP No. 1 would receive an average of 239,317 acre-feet per year under the no action (current allocation accounting) and 224,049 acre-feet per year on average with 2008 Operating Agreement accounting procedures. *Id.* In other words, under the 2008 Operating Agreement, EBID is to forego an average of almost 100,000

acre-feet per year and on average will receive about 10,000 acre-feet per year less than EP No. 1. There is no semblance of a "1938 condition" or an allocation based upon irrigation demands of 57% to EBID, 43% to EP No. 1 as alleged in Texas' Complaint.

C. Potential adverse effects for the Water Authority and Middle Rio Grande.

The Special Master's recommendation of a fixed delivery obligation at the state line is a concern for the Water Authority, especially when combined with Texas' contention that such deliveries must be premised on a "1938 condition." Neither the Special Master nor Texas has addressed how a fixed state line delivery obligation based upon a "1938 condition" can be administered under the Rio Grande Compact consistent with the flexible accounting allowed under Articles IV and VI. The latitude provided to New Mexico by Articles IV and VI of the Compact is called into question by the Special Master's recommendations in his First Interim Report. The consequences of the recommendations in the First Interim Report could likely be unanticipated results in the Middle Rio Grande.

POINT III

THE UNITED STATES SHOULD NOT BE GRANTED LEAVE TO LITIGATE CLAIMS TO FEDERALIZE THE LOWER RIO GRANDE

In its Complaint in Intervention, the United States alleges that:

> 13. New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts.

See United States' Complaint in Intervention at ¶ 13. It contends that all surface water and groundwater below Elephant Butte Reservoir is Rio Grande Project water, that only entities having contracts with the Secretary are entitled to Project water, and that the only entity in New Mexico with a water supply contract with the Secretary is EBID. *Id.* at ¶ 12.

The Special Master recommended that because the United States has made allegations that even if assumed to be true, do not plausibly give rise to an entitlement of relief, *viz.*, enforcement of the Rio Grande Compact, New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted. The First Interim Report states:

> The fact that the three signatory States to the 1938 Compact chose to use the Rio Grande Project, which had been in operation for years prior to the negotiation and signing of the compact, as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir does not give the United States a right of action under the 1938 Compact.

First Interim Report at 230. The Special Master concluded: "[t]he 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the Compact against New Mexico." *Id.* at 231.

The Special Master nevertheless recommended that the United States be granted leave to pursue its Complaint in Intervention based upon federal Reclamation law, not the Compact. *Id.* at 231-37.

The United States is claiming the right to administer all surface water and groundwater in the Lower Rio Grande in New Mexico, assuming all groundwater is hydrologically connected to the surface water. The effect of the United States' argument is to federalize this section of the Rio Grande raising issues as to the validity of state-based water rights. The same principle could be applied in the Middle Rio Grande to the detriment of the Water Authority and is not supported by state or federal law.

As a result of the Public Land Acts of 1866, 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the*

> *designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935) (emphasis added). *See also California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978). Accordingly, New Mexico, not the United States, has the ability to regulate and administer surface water and groundwater rights in the Lower Rio Grande.

New Mexico has been at the forefront of western states in the conjunctive administration of surface water and groundwater. More than a half century ago, the New Mexico State Engineer's authority to conjunctively manage surface water and groundwater was recognized in *Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73. In that case, the New Mexico Supreme Court recognized the interconnection of groundwater hydrologically connected to the Rio Grande in the Middle Rio Grande following the State Engineer's declaration of the Rio Grande Underground Water Basin on November 29, 1956. New appropriations of groundwater initiated by permit of the State Engineer after that date were required to "offset" the effects of their pumping on the Rio Grande by obtaining "offset" rights in the amount of the depletive effect

on the Rio Grande. This was done in part to ensure compliance with New Mexico's delivery obligation under the Rio Grande Compact.

There are additional consequences that flow from the recommendations in the First Interim Report on surface water and groundwater administration in Texas. If accepted by the Court, the Special Master's recommendation that the United States administers all surface water and groundwater in the Rio Grande Project necessarily means that the United States administration in this regard must continue to Ft. Quitman, Texas, and not stop at the New Mexico-Texas state line. If all New Mexico surface water and groundwater users below Elephant Butte Reservoir were required to have federal Reclamation contracts, the same would be true for all surface water and groundwater users in Texas above Ft. Quitman. This is critical because inefficiencies or changes in water use in Texas necessarily affects releases upstream just as Texas has claimed against New Mexico. Groundwater pumping in Texas affects drains and return flows, not just in Texas, but also in New Mexico. If the alleged "1938 condition" is required in New Mexico, then it is required in Texas such that all changes in water use after 1938 that affected deliveries to EP No. 1 including reduction in return flows, seepage and groundwater returns to the surface water system must be accounted for and Texas held accountable.

The United States' contention that it has administration and control over all surface water and groundwater in the Lower Rio Grande could also have

significant adverse consequences for the Water Authority. *See* United States' Complaint in Intervention at ¶¶ 12, 13. The Bureau of Reclamation operates El Vado Dam and delivers water to the Middle Rio Grande Conservancy District and the six Middle Rio Grande Pueblos. The United States could make a similar argument of the need to control groundwater use in the Middle Rio Grande from Otowi Gage to Elephant Butte Reservoir under the same premise. Assuming the United States prevailed and all groundwater is hydrologically connected to the surface water, the Water Authority could be forced to enter into water supply contracts with the United States rather than rely on its state-based groundwater rights. Whether it is in the Middle Rio Grande or Lower Rio Grande, municipalities have relied on state-based groundwater administration for more than a century and the United States has acquiesced in that practice. As the Court confirmed in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), long-standing acquiescence in an administrative practice can foreclose later arguments to the contrary. *Ibid.* at 595 ("And even if the issue was not previously determined [in prior litigation], we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence.")

Beyond the Rio Grande, the Bureau of Reclamation operates many federal Reclamation projects throughout the western United States for which this same argument could be made and therefore, use this precedent to federalize all stream-connected aquifers

where downstream delivery obligations exist. *See supra* at n.6.

CONCLUSION

The recommendations in the First Interim Report far exceed the bounds of a Rule 12(b)(6) motion to dismiss. Findings of fact and conclusions of law contained therein are not based upon evidence elicited at trial with procedural safeguards afforded by the Federal Rules of Evidence. The Special Master's interpretation of various Rio Grande Compact provisions has not had the benefit of discovery, a trial and briefing to explicate the meaning of the Compact, as also informed by historical Project administration. The recommendations in the First Interim Report have potential adverse effects upstream of Elephant Butte Reservoir, including the effects on the Water Authority and the Middle Rio Grande that have not been briefed by the parties or considered by the Special Master. In ruling on New Mexico's Motions to Dismiss, the Court should reject

the First Interim Report, except as set forth *supra* in n.2.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that the United States' complaint in intervention should be dismissed to the extent that it asserts claims under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785.

Respectfully submitted.

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In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

JURISDICTION

The Court granted Texas's motion for leave to file a bill of complaint on January 27, 2014. The Court granted the United States' motion for leave to intervene as a plaintiff on March 31, 2014. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. On November 3, 2014, the Court appointed A. Gregory Grimsal to serve as Special Master. On February 13, 2017, Special Master Grimsal submitted a first interim report that addresses New Mexico's motion to dismiss and motions to intervene filed by two irrigation districts. On March 20, 2017, the Court received the Special Master's report, ordered it filed, and allowed the parties to file exceptions. The jurisdiction of this Court rests on Article III, Section 2,

Clause 2 of the Constitution and 28 U.S.C. 1251(a) and (b)(2).

STATEMENT

A. Introduction

The Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, apportions the waters of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. See First Interim Report of the Special Master (Rep.) App. A1-A19. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir on the Rio Grande in New Mexico approximately 105 miles north of the Texas state line. Elephant Butte Reservoir is part of the Rio Grande Project (Project), a federal Bureau of Reclamation (Reclamation) project that was authorized, constructed, and already delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact.

In 2013, Texas sought leave to file a bill of complaint against New Mexico to enforce its rights under the Compact. Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that flows into Texas. At the Court's invitation, the United States filed a brief as amicus curiae, recommending that the Court grant Texas leave to file its bill of complaint. On January 27, 2014, the Court granted Texas leave to file and invited New Mexico to

file a motion to dismiss, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6).

The United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention based on several distinct federal interests that are at stake in this dispute over the interpretation of the Compact. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. The United States agrees that New Mexico is not fulfilling its Compact obligations to Texas. The United States further alleges that New Mexico has violated provisions of the Compact that protect the United States' interests, including its interest in the Project and its interest in compliance with a treaty obligation of the United States to deliver water to Mexico. After the case was referred to the Special Master (Master), two irrigation districts that have contracts with Reclamation for delivery of project water also filed motions for leave to intervene.

New Mexico moved to dismiss the complaints filed by Texas and the United States. New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas after New Mexico delivers water to Elephant Butte Reservoir. New Mexico contends that the Project's operations downstream of Elephant Butte Reservoir instead are controlled by state law, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users.

The Master has recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. As for the United States' complaint in intervention, the Master has recommended that the Court grant New Mexico's motion to dismiss to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law. The Master further recommends that the Court deny the motions for leave to intervene filed by the irrigation districts.

In this exception, the United States urges the Court to reject the Master's recommendation that the United States' complaint in intervention be dismissed to the extent the United States asserts a claim under the Compact.

B. The Rio Grande Basin

The Rio Grande River rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. Rep. App. B1 (map). After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas. See *ibid.*

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. Rep. App. B1. The Basin is approximately 700 miles long and has a drainage area of approximately 34,000 square miles. Nat'l Resources Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado,*

New Mexico, and Texas, 1936-1937, at 7, 296, 299 (1938) (*Joint Investigation*).

C. The Rio Grande Project

1. In the 1890s, recurring water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions in Colorado and New Mexico. *Joint Investigation* 8, 73. In 1896, in response, the U.S. Department of the Interior (Interior) imposed an embargo on any new use of federal land for works to divert water from the Rio Grande in Colorado and the Territory of New Mexico. *Id.* at 8; see *Waters of the Rio Grande and Its Tributaries*, H.R. Doc. No. 39, 62d Cong., 1st Sess. 2 (1911). In addition, at the direction of the International Boundary Commission, an investigation was made into "[t]he best and most feasible mode of * * * regulating the use of the waters of [the] river" so as to "secure to each country * * * [its] legal and equitable rights and interests." U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-4*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 396 (2d ed. 1905) (*Third Annual Report*). That investigation concluded that a large storage reservoir should be built on the Rio Grande above El Paso. *Id.* at 396-397.

In 1903, following enactment of the federal Reclamation Act (1902 Act), ch. 1093, 32 Stat. 388, Interior commissioned a new investigation on the Rio Grande, to be conducted by the Reclamation Service (Reclamation's predecessor). See U.S. Geological Survey, *Second Annual Report of the Reclamation Service 1902-3*, H.R. Doc. No. 44, 58th Cong., 2d Sess. 375 (1904). Reclamation concluded that a dam at Elephant Butte, near Engle, New Mexico, would be preferable to the

dam closer to El Paso recommended by the International Boundary Commission. See *Third Annual Report* 418-420. Because of its geographical setting and upstream location, the Elephant Butte dam would be able to impound more water and irrigate more land than a dam near El Paso, including as many as 90,000 acres in New Mexico. See *id.* at 410-419 & Plate XLVII (description and map of project). Thus, unlike the El Paso dam recommended by the International Boundary Commission, a dam at Elephant Butte would not "leave New Mexico out" from the benefit of the project. *Id.* at 397.

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, the State of Texas, other western States, and the Republic of Mexico, Reclamation presented its recommendation for the Elephant Butte dam. See *Official Proceedings of the Twelfth National Irrigation Congress* 213-215 (Guy E. Mitchell ed., 1905) (*Official Proceedings*). Representatives from Texas and New Mexico, as well as a delegation from Mexico, "heartily endorse[d] and approve[d]" the reservoir at Elephant Butte "as a happy solution of a vexed question that has embarrassed the parties interested." *Id.* at 107.

2. As a Reclamation Act project, the construction of the dam at Elephant Butte could be financed by charging assessments on irrigable land on a per-acre basis. See § 4, 32 Stat. 389. The Reclamation Act, however, did not authorize irrigation projects in Texas. See § 1, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The

Secretary of the Interior (Secretary) was authorized to proceed with construction of the dam only after determining that there was sufficient assessable (*i.e.*, irrigable) land in New Mexico and Texas to "render the project feasible and return to the [government] the cost of the enterprise." *Ibid.* Interior determined that there were 155,000 acres of land that could be supplied with water from the reservoir and therefore could be assessed for the cost of construction. U.S. Geological Survey, *Fifth Annual Report of the Reclamation Service 1906*, H.R. Doc. No. 204, 59th Cong., 2d Sess. 220, 223 (1906); see *Joint Investigation* 83.

With the project approved, the United States proceeded to acquire rights and enter into contracts necessary to ensure its success. Reclamation took the steps necessary to obtain water rights under New Mexico law for the Elephant Butte Reservoir and associated downstream diversions—together known as the Rio Grande Project. See *Joint Investigation* 73; Reclamation Act § 8, 32 Stat. 390 (requiring Interior to "proceed in conformity" with state and territorial law governing the appropriation of water). The law of the New Mexico Territory authorized the United States to secure water for reclamation project purposes by filing notices of intent with the territorial engineer. See 1907 N.M. Laws 85-86; 1905 N.M. Laws 277. In 1906, the United States filed a notice stating that it intended to use 730,000 acre-feet per year from the Rio Grande, to be diverted and stored by the Project in a reservoir with a capacity of two million acre-

feet. Rep. 103-104.[1] In 1908, the United States provided a further notice that it intended to use "[a]ll of the the unappropriated water" of the Rio Grande and its tributaries. Rep. 106 (citation and emphasis omitted). By operation of the territorial legislation, the "waters so described" by the United States would not be "subject to a further appropriation under the laws of the Territory." 1907 N.M. Laws 85-86; see 1905 N.M. Laws 277.

Next, the United States and Mexico resolved their dispute over irrigation shortages by entering into a treaty. See Convention Between the United States and Mexico Providing For the Equitable Distribution of the Waters of the Rio Grande For Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953. In Article I of the 1906 Treaty, the United States agreed to provide Mexico with 60,000 acre-feet of water per year from storage in Elephant Butte Reservoir. 34 Stat. 2953-2954. Article II of the treaty provides that in cases of extraordinary drought, "the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States." 34 Stat. 2954.

Reclamation secured payment of the assessments on the Project's irrigable acreage by entering into a contract with two water user associations—the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and El Paso County Water Improvement District No. 1 (EPCWID) in Texas. See *Joint Investigation* 83; see also Reclamation Act § 4,

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[1] An acre-foot is a quantity of water sufficient to cover one acre of land with one foot of water. *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1051 n.2 (2015).

32 Stat. 389 (authorizing Interior to enter into contracts with entities representing private landowners to recover charges); see Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States of America and the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association for Project Construction and Repayment of Construction and Operation and Maintenance Charges* (June 27, 1906).[2]

3. Construction of the dam at Elephant Butte began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. *Joint Investigation* 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73, 85. The Project extends over a distance of 250 miles from San Marcial, New Mexico (a former gaging station upstream of Elephant Butte) to Fort Quitman, Texas. *Id.* at 21. The Project adds a total storage capacity to the Rio Grande of over two million acre-feet. *Id.* at 15.

The Project is designed to deliver more water than it releases from Elephant Butte and Caballo Reservoirs. That is because historically some of the water supplied to Project water users in New Mexico seeps

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[2] Under the Reclamation Act, contracts with the Secretary were formed through petitions filed by individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

into the ground or flows off agricultural fields into drains and returns to the river. See *Third Annual Report* 425 (noting that the irrigable acreage in New Mexico was "all * * * tributary to" the land in Texas). The water returning to the river after initial use for irrigation (referred to as "return flow") becomes part of the water that is available for diversion by Project beneficiaries downstream. See, *e.g.*, *Montana* v. *Wyoming*, 563 U.S. 368, 380-384 (2011) (describing the doctrine of recapture). Return flows have historically been a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 (in the Elephant Butte-Fort Quitman section of the Rio Grande, "the return water of each subvalley becomes available to that next lower as far as the Tornillo heading of the Rio Grande Project"); *ibid.* ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

4. In 1937, Congress authorized the Secretary to enter into a contract with the two districts, under which the districts would be relieved of the construction costs associated with power development at Elephant Butte dam in exchange for conveyance by the districts of all of their "right, title, interest, and estate in the use of said dam and other project works, including the project water supply," for the development of hydroelectric energy. Interior Dep't Appropriation Act, 1938, ch. 570, 50 Stat. 564. In 1937, the Secretary entered into a contract with each district in accordance with that congressional authorization. See Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States of America and*

EBID for the Adjustment of Construction Charges and Cancellation of Power Privilege Agreement (Nov. 9, 1937); Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States and the EPCWID Adjusting Constructions Charges and for Other Purposes* (Nov. 10, 1937).

On February 16, 1938, EBID and EPCWID entered into a contract under which each district would receive water and pay charges in proportion to its share of the Project's 155,000 irrigable acres: EBID would pay charges on 88,000 irrigable acres in New Mexico, and EPCWID would pay charges on 67,000 acres in Texas. Contract Between EBID and EPCWID 1 (Rep. DVD Doc. 12). The 1938 contract provides that "in the event of a shortage," distribution from the Project would, "so far as practicable, be made in proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Ibid.* Those proportions are roughly equivalent to 57% for EBID in New Mexico and 43% for EPCWID in Texas. The Assistant Secretary of the Interior approved the agreement. *Id.* at 2.

Today, Reclamation plans Project releases pursuant to the 1906 Treaty with Mexico and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement entered into by Reclamation, EBID, and EPCWID. See Bureau of Reclamation, U.S. Dep't of the Interior, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* 4-9 (Sept. 30, 2016) (2008 Operating Agreement).[3] Under the 2008 Oper-

[3] Available at https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf.

ating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. *Id.* at 6-8. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 4-5.[4]

D. The Rio Grande Compact

1. The establishment of the Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The embargo on use of federal land for diversion works in Colorado and New Mexico was lifted in 1925, however, and operation of the Project did not address concerns about development in Colorado and in New Mexico upstream of Elephant Butte Reservoir that was depleting the water supply to the Project. *Joint Investigation* 67. Accordingly, in 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate and enter into, subject to congressional approval, a compact or agreement "providing for an equitable division and apportionment" of the waters of the Rio Grande and its tributaries. Act of Mar. 2, 1929 (1929 Act), ch. 520, 45 Stat. 1502. Congress gave its consent to the negotiation of a compact "upon condition that a representative of the United States[,] * * * to be appointed by the President, shall participate in the negotiations." § 2, 45 Stat. 1502. The federal representative was to "represent the interests

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[4] New Mexico has filed a suit in federal district court to challenge the 2008 Operating Agreement. See *New Mexico* v. *United States*, No. 11-cv-0691 (D.N.M. filed Aug. 8, 2011).

of the government * * * so far as they are affected by the [1906 Treaty] with Mexico * * * and the investment which the government has in the Rio Grande project in New Mexico and Texas." Rep. 120 (citation omitted).

To maintain the status quo on the river during the negotiations, the States of Colorado, New Mexico, and Texas agreed to an interim compact, which Congress approved. Act of June 17, 1930 (1930 Act), ch. 506, 46 Stat. 767. Article VII(a) of the interim compact called for a commission of three members composed of a representative of each State for purposes of concluding a compact "for the equitable apportionment of the use of the waters of the Rio Grande among said States." 46 Stat. 771. The interim compact also provided for a federal representative, appointed by the President, to sit with the commission. *Ibid.* Pending completion of a final compact, the commission was to "equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin" in 1929. Art. VII(b), 46 Stat. 771. New Mexico "agree[d]" in the interim compact that it would "not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." Art. XII, 46 Stat. 772.

In 1935, when the parties were unable to reach a permanent agreement, the interim compact was extended to June 1, 1937. Act of June 5, 1935, ch. 177, 49 Stat. 325; see *Joint Investigation* 8-9. It was later extended to October 1, 1937. Rio Grande Compact Commission, *Proceedings of Rio Grande Compact Commission held in Santa Fe, New Mexico* 24 (Mar.

3-4, 1937) (Rep. DVD Doc. 4); *Joint Investigation* 9. During that time, the federal National Resources Committee appointed a board to review the situation and recommend appropriate action. *Joint Investigation* 10.[5] The board gathered facts about "the available water supply, the water uses and requirements, and the possibilities of additional water supplies by storage, importations[,] and salvage of present losses and wastes." *Id.* at 11. In 1938, the National Resources Committee released the results of its investigation in the comprehensive *Joint Investigation* report. With that information, and with the participation of a federal representative, see 1930 Act Art. VII(a), 46 Stat. 771, the States were able to negotiate a permanent compact. Rio Grande Compact Commission, *Proceedings of the Rio Grande Compact Commission held at Santa Fe, New Mexico* (Mar. 3-18, 1938) (Rep. DVD Doc. 8).

2. On March 18, 1938, the States executed the Rio Grande Compact. Congress approved the Compact the following year. Ch. 155, 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and "for

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[5] In 1935, the National Resources Committee was established by Executive Order and was composed of the Secretaries of the Interior (who served as Chair), War, Agriculture, Commerce, and Labor, the Federal Emergency Relief Administrator, and three additional members appointed by President Roosevelt. Exec. Order No. 7065 (1935), *reprinted in The Public Papers and Addresses of Franklin D. Roosevelt, 1935*, at 242-248 (Samuel I. Roseman ed., 1938). The National Resources Committee replaced a National Resources Board established in 1934. *Ibid.*

the purpose of effecting an equitable apportionment of such waters." *Ibid.*

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gaging stations. 53 Stat. 787-788.

Article IV of the Compact requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission, established under Article XII of the Compact, 53 Stat. 791, relocated the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. ¶ 13; N.M. Mot. to Dismiss 11 n.2.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. 53 Stat. 789-790. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of credits and debits. It establishes limits on the total amount of credits and debits that an upstream State may accrue, and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte Reservoir] at all times to the extent of its accrued debit." 53 Stat. 789.

Article VII of the Compact provides that Colorado and New Mexico may not store additional water in reservoirs constructed after 1929 "whenever there is less than 400,000 acre feet of usable water in project

storage,"[6] unless actual releases from the Project from the beginning of the calendar year have aggregated to more than an average of 790,000 acre-feet per year. 53 Stat. 790.

Article VIII of the Compact permits Texas to demand that Colorado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in the Project to 600,000 acre-feet. 53 Stat. 790. The release of stored water under Article VIII is to be made at the greatest rate practicable and in amounts sufficient to allow for "a normal release of 790,000 acre feet * * * from project storage in that year." *Ibid.*

The combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "[p]roject [s]torage." Art. I(k), 53 Stat. 786. The only other such reservoir is Caballo Reservoir, described above. See p. 9, *supra*. The Compact fixes the maximum amount of water in project storage at 2,638,860 acre-feet. Art. I(k), 53 Stat. 786. The Compact defines "[u]sable [w]ater" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It fur-

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[6] "Usable [w]ater" is defined in Article I(*l*) of the Compact, 53 Stat. 786. See p. 16, *infra*.

ther provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." Art. XI, 53 Stat. 791.

Article XVI of the Compact provides that "[n]othing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes." 53 Stat. 792.

E. The State Water Adjudication

New Mexico has contended in this suit that state law governs releases from Project storage, such that any remedy for depletions of return flows and hydrologically connected groundwater should be addressed through an enforcement action in state court. A New Mexico state court is currently determining the rights to the water of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 (N.M. 3d Jud. Dist. filed Sept. 24, 1996) (*Lower Rio Grande Adjudication*).[7] The United States' water rights for the Project are being adjudicated in that proceeding.[8]

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[7] Docket entries for the state water adjudication are available at https://lrgadjudication.nmcourts.gov.

[8] See Lower Rio Grande Adjudication, *SS-97-104; US Interest (Reverse Chronological Order)*, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx (last visited June 9, 2017) (online docket). The United States filed an action to quiet title to water for the Project in federal district court

The state court has concluded that the United States' water right for the Project is a surface right only, and that the Project is not entitled to "groundwater." See Order Granting the State's Mot. to Dismiss the U.S. Claims to Groundwater and Denying the U.S. Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Aug. 16, 2012) (8/16/12 Order). The court acknowledged that there is "an interactive relationship between groundwater and surface water * * * within many New Mexico stream systems, including the Rio Grande reach downstream of Elephant Butte Dam," but the court stated that New Mexico law "nevertheless recognizes surface water and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court acknowledged that the Project relies on "reuse of water" in that the Project typically is able to deliver more water than is released from project storage. 8/16/12 Order 6. The court further acknowledged that "seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water." *Id.* at 7. The court concluded, however, that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir

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on the ground that because the Project has interstate and international obligations to deliver water, the Project right should be fully adjudicated in one proceeding rather than in separate proceedings in New Mexico and Texas state courts. See 97-cv-00803 Docket entry No. (Docket No.) 245, at 16-17, 21 (D.N.M. Aug. 22, 2000). That action has been stayed pending the outcome of the proceeding in New Mexico state court. Docket No. 281 (June 12, 1997); see *United States* v. *New Mexico*, 624 Fed. Appx. 671 (10th Cir. 2015) (providing summary of case history and affirming denial of motion to lift stay).

and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." *Ibid.* (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). Thus, under the state court's ruling, the Project is not entitled to a groundwater right, and the protection of Project seepage and return flow in the ground from appropriation can only be had upon an administrative determination by the State Engineer that the water has not "lo[st] its identity as [Project] surface water." *Ibid.* (citation omitted).

The United States also requested that the state court's quantification of the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre-feet per year, as recognized by a Texas water-rights decree. U.S. Mem. in Supp. of Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Apr. 24, 2013); see *In re Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex. Oct. 30, 2006). The court declined to recognize the Project's right to deliver water sufficient to satisfy the Texas decree. Order, *Lower Rio Grande Adjudication*, *supra* (filed Feb. 17, 2014). The court explained that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." *Id.* at 4. The court did not mention the Project's need to deliver water to Mexico.

Earlier this year, the state court determined that the priority date for the Project's water rights is

March 1, 1903. See Findings of Fact and Conclusions of Law 55, *Lower Rio Grande Adjudication*, *supra* (filed Apr. 17, 2017).

F. The Current Controversy

1. In this original action, Texas alleges that New Mexico is violating the Compact by authorizing the diversion of surface water and hydrologically connected groundwater downstream of Elephant Butte Reservoir. Tex. Compl. ¶ 18. Texas contends that once New Mexico delivers water to Elephant Butte Reservoir, as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. *Id.* ¶ 4. Texas alleges that the deliveries to which it is entitled under the Compact cannot be assured if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir in excess of Project allocations. *Id.* ¶ 11.

Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. Tex. Compl. ¶¶ 18, 19. In particular, Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." *Id.* ¶ 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which in turn requires additional releases from Elephant Butte Reservoir and thereby decreases

the amount of water stored in the reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id.* ¶ 19.

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Tex. Compl. ¶¶ 15-16.

2. After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene in this action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. The Court granted the United States leave to intervene. 134 S. Ct. 1783.

The United States agrees with Texas that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir" in excess of the Project allocations that secure Texas's Compact apportionment. U.S. Compl. ¶ 13. The United States further alleges that the diversions in New Mexico violate federal reclamation law to the extent that water users are intercepting Project deliveries in the absence of a contract with the United States, or in excess of contractually authorized amounts. *Id.* ¶¶ 12-13.

The United States contends that the unlawful depletion of surface water and groundwater in New Mexico below Elephant Butte "affects surface water deliveries" to downstream Project beneficiaries. U.S. Compl. ¶ 14. The United States agrees with Texas that, as a consequence, the United States may have to

release additional water from storage to offset the anticipated depletions, reducing the water available in storage for future deliveries. *Ibid.* The United States also alleges that the "[u]ncapped use of water" sanctioned by New Mexico below Elephant Butte Reservoir "could reduce [the Project's] efficiency to a point where 43% of the available water could not be delivered to EPCWID, and 60,000 acre-feet per year could not be delivered to Mexico." *Id.* ¶ 15.

The United States seeks relief from New Mexico's interference with the operation of the Project. The United States asks the Court to declare that, "as a party to the Compact," New Mexico (i) may not permit water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico, (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and (iii) must affirmatively act to prohibit or prevent such interception or interference. U.S. Compl. 5. The United States also requested prohibitory and mandatory injunctive relief to the same effect. *Ibid.* The United States' complaint does not seek monetary relief or an apportionment of water for the United States.

3. New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. N.M. Mot. to Dismiss 27-

40. New Mexico contends that the Project's water rights below Elephant Butte Reservoir instead are controlled by state law, *id.* at 48-58, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users, *id.* at 37-40, 59-63. In its reply brief, New Mexico argued that if the Court dismisses Texas's claims, the United States' claims should also be dismissed because the United States "is not a party to the Compact." N.M. Reply Br. 28.

G. The First Interim Report Of The Special Master

On August 19, 2015, the Special Master heard argument on New Mexico's motion to dismiss. 8/19/15 Tr. The hearing also addressed motions to intervene filed by EBID and EPCWID. On July 1, 2016, the Master issued a draft first interim report to the parties and invited corrections of a technical or factual nature. Case Mgmt. Order No. 11. On February 9, 2017, the Master issued the First Interim Report. On March 20, 2017, the Court ordered the report filed and allowed the parties to file exceptions. 137 S. Ct. 1363.

1. The Master has recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. Rep. 187-217.

a. The Master concluded that the plain text of Article IV of the Compact, which establishes an "obligation" of New Mexico to "deliver" a quantity of water to Elephant Butte Reservoir, "requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." Rep. 197; see Rep. 195-198. The Master rejected New Mexico's contention that nothing in the Compact prohibits New

Mexico from allowing or authorizing diversions of water downstream of Elephant Butte Reservoir. *Ibid.* The Master explained that New Mexico's interpretation "disregards the text of Article IV" and renders the terms "obligation" and "delivery" void. Rep. 197.

b. The Master next concluded that the structure of the Compact supports Texas's claim. Rep. 198-203. The Master explained that Article I(*l*) of the Compact, which defines "[u]sable [w]ater" as water in project storage that is "available for release in accordance with irrigation demands, including deliveries to Mexico," 53 Stat. 786, demonstrates that the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200. The Master further explained that Article VIII, which permits Texas to demand that Colorado and New Mexico release water from storage in certain circumstances to bring the quantity of usable water in the Project to 600,000 acre-feet, 53 Stat. 790, is designed to ensure that the Project can "meet [its] contractual irrigation demands." Rep. 201; see Rep. 200-201. Accordingly, the Master concluded, the Compact "do[es] not simply require New Mexico to make water deliveries to Elephant Butte Reservoir." Rep. 201. Rather, the Compact "is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share." *Ibid.*

The Master noted that New Mexico's reading of the Compact would "leave[] the question of Texas's equitable apportionment" under the Compact "an open, major source of controversy." Rep. 202. That reading

would be contrary to the basic purpose of the Compact, which is "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and to "effect[] an equitable apportionment of such waters." Rep. 202-203 (emphasis omitted) (quoting Compact 53 Stat. 785).

c. The Master further concluded that the purpose and history of the Compact confirm that the States intended to use the Project "as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209. The Master explained that the Compact "was the culmination of years of national and international problem-solving, litigation, legislation, and negotiation by irrigators, engineers, and politicians to irrigate lands in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin." Rep. 204. The Master reviewed the negotiating history and concluded it was "plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters." Rep. 209. The Master further reasoned that, in light of this Court's equitable apportionment power and an original action filed by Texas in 1935 claiming violations of the 1929 interim compact,[9] "it is unfathomable that Texas 'would trade away its right to the Court's equitable apportionment,' had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas." Rep.

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[9] See *Texas* v. *New Mexico*, 296 U.S. 547 (1935) (granting Texas leave to file a bill of complaint).

209 (quoting *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1052 (2015)).

d. The Master rejected New Mexico's contention that state law governs the distribution of water delivered by the Project. Rep. 210-217. Based on this Court's pronouncement that an equitable apportionment in a compact "is binding upon the citizens of each State and all water claimants," *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), the Master concluded that New Mexico, by entering into the Compact, "relinquished its own rights to the water it delivers in Elephant Butte Reservoir," Rep. 216, including the right to allow for the appropriation of those waters by the inhabitants of New Mexico under state law, Rep. 211-217. Therefore, "any question of the rights of any signatory State to water apportioned by the 1938 Compact * * * must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court." Rep. 216 (citing *Hinderlider*, 304 U.S. at 110).

e. For purposes of the motion to dismiss, the Master assumed as true Texas's allegations that New Mexico is impairing project deliveries by diverting surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir. Rep. 201. Because the Master concluded that the Compact forbids New Mexico from intercepting Project deliveries to Texas, he concluded that Texas's complaint states a plausible claim for which relief can be granted. Rep. 217.

2. The Master recommended that the Court grant in part and deny in part New Mexico's motion to dismiss the complaint in intervention filed by the United States. Rep. 217-237.

a. The Master concluded that the United States cannot state a claim under the Compact because the Compact is an agreement among Colorado, New Mexico, and Texas, and does not apportion water to the United States. Rep. 229-231. The Master concluded that, although the States used the Project "as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir," that choice by the States does not give the United States a "right of action under the * * * Compact." Rep. 231. According to the Master, that conclusion follows from *Nebraska* v. *Wyoming*, 515 U.S. 1 (1995), under which "the United States would have to assert 'violations [which] have the effect of undermining [its own] apportionment [of water]'" in order to state a claim. Rep. 231 (brackets in original) (quoting *Nebraska* v. *Wyoming*, 515 U.S. at 16).

b. The Master further concluded, however, that the United States stated a plausible claim against New Mexico under federal reclamation law. Rep. 231-237. The Master assumed as true the United States' allegation that New Mexico has allowed the diversion of Project water by users who do not have contracts with the United States or are using water in excess of contractual amounts. Rep. 232 (citing U.S. Compl. ¶ 13). The Master explained that "[f]ederal reclamation law has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project," and "th[e] requirement of a contract for project water extends to seepage and return flows." Rep. 232 (citing *Bean* v. *United States*, 163 F. Supp. 838 (Ct. Cl.), cert. denied, 358 U.S. 906 (1958)). The Master recommended that the Court should exercise its original, non-exclusive

jurisdiction over suits between the United States and a State, see 28 U.S.C. 1251(b)(2), to consider and resolve a reclamation-law claim by the United States against New Mexico "for purposes of judicial economy." Rep. 234.

3. The Master recommended that the Court deny the motions to intervene filed by EBID and EPCWID. Rep. 237-278. The Master concluded that EBID's motion was procedurally deficient because it did not set forth any claims or defenses for which intervention was sought, nor did it seek any relief against either Texas or New Mexico. Rep. 247-251. The Master further concluded that EBID and EPCWID each failed to demonstrate "[a] compelling interest in [its] own right * * * which interest is not properly represented by" New Mexico or Texas, respectively. Rep. 251 (brackets in original) (quoting *South Carolina* v. *North Carolina*, 558 U.S. 256, 266 (2010)); see Rep. 251-264 (EBID); Rep. 270-277 (EPCWID).

SUMMARY OF ARGUMENT

The United States has stated a claim for declaratory and injunctive relief based on New Mexico's violation of the Compact. The United States may obtain such relief both because the Compact is a federal law that protects specific federal interests, and because the United States is an intended third-party beneficiary of the Compact.

A. To effectuate an equitable apportionment among Colorado, New Mexico, and Texas, the Compact incorporates and relies upon the Rio Grande Project, a federal reclamation project that is obligated to deliver water to Mexico and to irrigation districts in Texas and lower New Mexico. By enacting a requirement that New Mexico deliver water to Elephant

Butte Reservoir, and thus relinquish control over the water, the Compact protects the United States' ability to meet those obligations. Because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact, the United States may seek declaratory and injunctive relief against New Mexico.

1. The United States can obtain declaratory and injunctive relief against New Mexico based on allegations that New Mexico is violating a federal statute that protects the United States' ability to comply with its treaty obligation to deliver Project water to Mexico. Ensuring that treaty obligations are not jeopardized by a State's violation of an interstate compact is a distinctively federal interest that is best presented by the United States in this original action. The United States properly intervened as a plaintiff to seek to enjoin conduct that violates the Compact to the detriment of the United States' ability to comply with its treaty obligation.

2. The United States may also obtain declaratory and injunctive relief against New Mexico's interference with Project operations that are protected by the Compact. The States agreed to use the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the waters of the Rio Grande. By incorporating the Project into the equitable apportionment framework, the Compact protects the water that is released from the Project in order for it to reach its intended destination. The United States has a right and obligation protected by the Compact to deliver water to contract holders in Texas and lower New Mexico, and the United States may properly seek to enjoin New Mexico's interfer-

ence with Project operations, in violation of its Compact obligations.

3. The Master's conclusion that the United States could not bring a claim for injunctive relief under the Compact was based in part on an incorrect understanding that the United States has never before intervened as a plaintiff in an original action asserting that it has rights protected by a compact. The United States has intervened as a plaintiff in other original actions to protect its rights and duties pertaining to interstate streams. Nor does *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), 507 U.S. 584 (1993), and 515 U.S. 1 (1995), support the Master's conclusion that the United States must receive an apportionment of water to assert a claim for injunctive relief under the Compact. That case demonstrates that the United States can enforce an equitable apportionment decree that protects Reclamation project characteristics that are a necessary predicate to the apportionment of an interstate stream. The case also demonstrates that the United States should be permitted to bring a compact claim against a State that undermines the operation of an interstate compact to the detriment of federal interests that the Compact expressly protects.

B. For the same reasons that the United States may seek to enjoin violations of the Compact because it is a federal law that expressly incorporates and protects federal interests, the United States can also bring a claim for declaratory and injunctive relief against New Mexico as an intended third-party beneficiary of the Compact insofar as the Compact is viewed as a contract. The Compact protects the water that is released from the Project for it to reach its intended destination, which is Reclamation's respon-

sibility pursuant to contracts with irrigation districts and the 1906 Treaty. The Compact thus reflects the intention of the parties to benefit the United States directly.

ARGUMENT

This Court's original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983). The Court's jurisdiction also extends to controversies between the United States and a State. 28 U.S.C. 1251(b)(2). The Court therefore has jurisdiction over the United States' complaint in intervention in this suit brought by Texas against New Mexico and Colorado.

The Court has looked to the Federal Rules of Civil Procedure to inform procedures in original actions. See Sup. Ct. R. 17.2. Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. Under Rule 12(b)(6), a court must proceed "on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The Court must decide whether, assuming the factual allegations in the complaint are true, the plaintiff has "state[d] a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

In this case, the United States has stated a claim for declaratory and injunctive relief based on New Mexico's violation of the Rio Grande Compact. The United States may obtain such relief both because the Compact is a federal law that incorporates and protects specific federal interests, and because the United States is, insofar as the Compact is considered as a

contract, an intended third-party beneficiary of the Compact. Under either theory—or both—the Court should reject the Master's conclusion that the United States cannot obtain declaratory or injunctive relief to enforce promises made by New Mexico in the Compact that protect important interests of the United States.

THE UNITED STATES MAY SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST NEW MEXICO FOR VIOLATIONS OF THE RIO GRANDE COMPACT

The Special Master has recommended that the Court grant New Mexico's motion to dismiss the United States' complaint in intervention "to the extent that the United States cannot state a plausible claim under the 1938 Compact." Rep. 237. The Master reasoned that the United States does not have a "right of action under the * * * Compact" because the Compact did not apportion any water to the United States. Rep. 231; Rep. 229-231. For the reasons explained below, the Court should reject that recommendation.[10]

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[10] New Mexico did not move to dismiss the United States' complaint on those grounds. Rather, New Mexico moved to dismiss the United States' complaint on the same grounds that it moved to dismiss the complaint filed by Texas—that New Mexico's only obligation under the Compact is to deliver water to the Elephant Butte Reservoir, N.M. Mot. to Dismiss 27-40, and that its obligations with respect to water in New Mexico below Elephant Butte are governed by New Mexico state law, *id.* at 48-58. As a result, the Master reached the conclusion that the United States must have an apportionment of water before it may bring an action to enforce a compact without briefing from the parties on that issue.

A. The United States May Obtain Declaratory And Injunctive Relief To Protect Federal Interests That Are Harmed By New Mexico's Violation Of The Compact

The Master's conclusion that the United States could not state a claim under the Compact because it received no equitable apportionment appears to have been based in part on principles of contract law. See Rep. 193 (noting that "[i]nterstate compacts are construed as contracts under the principles of contract law") (brackets in original) (quoting *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013)). Although interstate compacts in some respects are properly viewed as contracts among States, "an interstate compact is not just a contract; it is a federal statute enacted by Congress." *Alabama* v. *North Carolina*, 560 U.S. 330, 351 (2010); see *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1052 (2015). The Compact Clause of the United States Constitution provides that "[n]o State shall, without the Consent of Congress, * * * Compact with another State." U.S. Const. Art. I, § 10, Cl. 3; see *Texas* v. *New Mexico*, 462 U.S. at 564. When Congress gives its consent to a compact, the compact becomes "a law of the United States." *Texas* v. *New Mexico*, 462 U.S. at 564 (quoting *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981)).

To effectuate an equitable apportionment among Colorado, New Mexico, and Texas, the Compact incorporates and relies upon a federal reclamation project that is obligated to deliver water (i) to Mexico pursuant to a treaty and (ii) to irrigation districts in Texas and lower New Mexico pursuant to contracts that preexisted the Compact. By securing a promise from New Mexico to "deliver" Rio Grande water to Elephant Butte Reservoir, see Art. IV, 53 Stat. 788,

and thus relinquish control of the water, Rep. 195-197, the Compact protects the United States' ability to meet those obligations. See Rep. 200 (the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination").

Congress gave its consent for the States to negotiate a compact on the condition that a federal representative appointed by the President participate in the negotiations, 1929 Act ch. 520, 45 Stat. 1502, and the federal representative's role in the negotiations was to ensure that those specific federal interests were protected, Rep. 120. Congress approved the Compact with those protections in place. See *Cuyler*, 449 U.S. at 439-440 (constitutional requirement that Congress must approve interstate compacts ensures that agreements between States do not infringe on federal interests). Because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact, the United States may seek declaratory and injunctive relief against New Mexico.

1. The United States may seek relief against New Mexico to protect its treaty obligation to deliver Project water to Mexico

a. This Court has held that the United States may sue to enjoin state action that undermines interests protected by a federal statute or interferes with obligations of the United States under a treaty. In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), the United States brought an action to enjoin an Illinois corporation "from diverting water from Lake Michigan in excess of 250,000 cubic feet per minute; the withdrawal of that amount having been authorized by the Secretary of War." *Id.* at 423. The

United States contended that the corporation's withdrawal of more than the federally authorized amount, under the authority of a state statute, threatened the navigability of waters of the United States protected by the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121. See *Sanitary Dist. of Chicago*, 266 U.S. at 423. The Court concluded that the United States could enjoin that conduct "not only to remove obstruction to interstate and foreign commerce," but also because depletion of the water implicated the United States' obligations to Canada under a boundary waters treaty. *Id.* at 425.

Similarly, in *United States* v. *County of Arlington*, 669 F.2d 925, appeal dismissed and cert. denied, 459 U.S. 801 (1982), the Fourth Circuit held that the United States could obtain declaratory relief and enjoin the City of Arlington, Virginia, from collecting taxes on real estate owned by the German Democratic Republic (GDR) to house the staff of its diplomatic mission and their families. *Id.* at 927-928. The court rejected the State's argument that the United States was required to join the GDR in the suit, explaining that the United States had sued "to vindicate its own policy and authority." *Id.* at 928. The court held that even though the United States had no pecuniary interest in the controversy, it could sue based upon its sovereign interest in complying with its obligations under the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and a bilateral agreement with East Germany. See *County of Arlington*, 669 F.2d at 928-929; see also, *e.g.*, *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 152 (E.D.N.Y.) ("In the exercise of its constitutional responsibility for the conduct of foreign affairs, the

United States may sue to prevent state action which would violate a treaty obligation of the United States."), aff'd, 450 F.2d 884 (2d Cir. 1971); cf. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-696 (1979) (holding that federal court could declare rights under an Indian fishing rights treaty in suit brought by the United States against the State of Washington).

b. Under those precedents, the United States can obtain declaratory and injunctive relief against New Mexico based on allegations that New Mexico is violating a federal statute that protects the United States' ability to comply with its treaty obligation to deliver Project water to Mexico. As described above (p. 5, *supra*), before the Project was constructed, Mexico had pressed claims against the United States based on recurring water shortages along the lower Rio Grande. *Joint Investigation* 8, 73. The problem was studied by the International Boundary Commission and later by the Reclamation Service, and the solution was to build a dam at Elephant Butte. That recommendation was "heartily endorse[d] and approve[d]" by attendees of the 1904 Irrigation Congress —including a delegation from Mexico—to resolve disputes over the waters of the Rio Grande. *Official Proceedings* 107. The Project was constructed in part to facilitate delivery of water to Mexico. Indeed, the United States is obligated by the 1906 Treaty to deliver 60,000 acre-feet of water per year to Mexico from storage in Elephant Butte Reservoir. Art. I, 34 Stat. 2953-2954.

The Compact protects the United States' ability to fulfill its treaty obligation by requiring New Mexico to "deliver," and thereby relinquish control of, a specific

quantity of water into "[p]roject [s]torage" in Elephant Butte Reservoir. Arts. I(k) and IV, 53 Stat. 786, 788; see Rep. 195-197. From there, it becomes "[u]sable [w]ater" that is controlled by Reclamation and released "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786; see also Article XVI, 53 Stat. 792 ("Nothing in this Compact should be construed as affecting the obligations of the United States of America to Mexico under existing treaties.").

In its complaint in intervention, the United States identified its interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with delivery of Project water to Mexico, in violation of New Mexico's Compact obligations. The United States alleged that "extraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to * * * Mexico" and that, even with the 2008 Operating Agreement in place, "[u]ncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where * * * 60,000 acre-feet per year could not be delivered to Mexico." U.S. Compl. ¶¶ 14-15; see U.S. Mem. in Supp. 8-9.

The United States further explained that, under Article II of the 1906 Treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See U.S. Mem. in Supp. 8-9 (citing Art. 11, 34 Stat. 2954). The United States explained that, "[w]here surface water deliveries to irrigation dis-

tricts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts, the United States must carefully consider whether Article II of the treaty would allow a proportional reduction of its delivery obligation to Mexico during an extraordinary drought." *Ibid.*

Ensuring that treaty obligations are not jeopardized by a State's violation of an interstate compact is a "distinctively federal interest[]" that is "best presented by the United States" in this original action. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). Indeed, the United States intervened as a plaintiff in a previous original action brought by Texas against New Mexico to enforce the Pecos River Compact, Act of June 8, 1949, ch. 184, 63 Stat. 159, in part to protect its treaty obligations to Mexico. See U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Supp. of Mot. for Leave to Intervene as Pl., *Texas* v. *New Mexico*, No. 65, Orig. (filed Aug. 20, 1975); *Texas* v. *New Mexico*, 421 U.S. 927 (1975) (No. 65, Orig.) (granting United States' motion for leave to intervene).[11] The United States explained that it had "substantial rights and obligations with respect to the waters of the Pecos River stream system—including an international responsibility to assure deliveries to the Republic of Mexico."[12] U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New*

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[11] The Pecos River is a tributary of the Rio Grande, entering it near Langtry, Texas. *Texas* v. *New Mexico*, 462 U.S. at 556.

[12] See Treaty between the United States and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Nov. 27, 1945, U.S.-Mex., 59 Stat. 1219.

Mexico, *supra* (No. 65, Orig.). Likewise in this case, the United States properly intervened as a plaintiff to enjoin conduct that violates an interstate compact to the detriment of the United States' ability to comply with a treaty obligation, which is protected by the Compact.

2. The United States may seek relief against New Mexico to protect the operation of the Rio Grande Project and its contractual obligation to deliver Project water to EBID and EPCWID

a. Furthermore, the United States may obtain declaratory and injunctive relief based on New Mexico's interference with Project operations that are protected by the Compact. Under the Compact, New Mexico is obligated to deliver water into "[p]roject [s]torage" at Elephant Butte Reservoir. Arts. I(k) and IV, 53 Stat. 786, 788. That reservoir was already authorized, constructed, and delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas (and pursuant to the 1906 Treaty with Mexico) before the States entered into the Compact. See pp. 5-12, *supra*. As the Master correctly recognized, "the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209. The Compact protects the Project's operations by designating the water in "[p]roject [s]torage," which includes all water delivered into Elephant Butte Reservoir by New Mexico, as "[u]sable [w]ater" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(k) and (*l*), 53 Stat. 786. By incorporating into the equitable apportionment framework the Project and its

preexisting contracts and treaty commitments governing irrigation demands, the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200.

b. Like the United States' ability to fulfill its treaty obligations, the United States' ability to protect the integrity of Project operations that are incorporated into the Compact's equitable apportionment framework is a distinctively federal interest that warrants intervention by the United States. *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and thus between the States of New Mexico and Texas, and the United States has a right and obligation protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands. The United States may properly seek to enjoin New Mexico's interference with its Project operations and contracts, in violation of New Mexico's Compact obligations.

3. The Special Master's conclusion that the United States cannot state a claim under the Compact is based on an incomplete understanding of the United States' participation in original actions

a. The Master's conclusion that the United States cannot bring a claim to enforce the Compact was based in part on an incomplete understanding of the United States' participation in original actions. The Master stated that, "historically, the United States has participated primarily as *amicus curiae*" in original actions where States invoke the Court's original jurisdiction "to apportion interstate streams or to

enforce compacts or decrees apportioning those streams." Rep. 220. According to the Master, this is "the first time in its history of litigating within original actions" that the United States "has intervened as a *party plaintiff*" asserting that it has rights protected by a compact. Rep. 229. That is incorrect.

As noted above, pp. 38-39, *supra*, the United States intervened as a plaintiff in a previous dispute between Texas and New Mexico over the Pecos River Compact, in part to protect its obligation to deliver water to Mexico pursuant to a treaty. In its motion to intervene in that case, the United States also sought to protect its "rights and duties appertaining to federal lands and facilities along the stream or within the watershed." U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.); see Compl. ¶¶ XVII and XVIII, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.) (referring to rights under federal reclamation projects). The United States noted that "[t]he Pecos River Compact does not purport to affect the water rights of the United States," but "[t]his does not mean * * * that the rights and obligations of the United States will be unaffected by the outcome of the litigation." U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.). This Court recognized that the United States intervened in the case "to protect its own claims on the waters of the Pecos River, which had been preserved in Art[icles] XI-XII of the Compact." *Texas* v. *New Mexico*, 462 U.S. at 562. Similar to the Rio Grande Compact, Article XI of the Pecos River Compact provides that "[n]othing in this Compact shall be construed as * * * [a]ffecting the obligations of the United States

under the Treaty with the United Mexican States" or "[a]ffecting any rights or powers of the United States * * * in or to the waters of the Pecos River." 63 Stat. 164-165.

The United States also intervened in a prior suit filed by Texas and New Mexico against Colorado involving the Rio Grande Compact. See U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. for the U.S., *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968); *Texas* v. *Colorado*, 391 U.S. 901 (1968) (No. 29, Orig.) (granting United States' motion for leave to intervene). The United States intervened in that action "to protect its rights in the Rio Grande stream system." U.S. Compl. ¶ VI, *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968). In its complaint, the United States alleged that, "[a]ssuming that the Rio Grande Compact is valid and enforceable, * * * the United States believes that its interests will be protected by compliance with its terms." *Ibid.* The United States reserved the right to amend its complaint "[i]n the event of * * * a determination by the Court that the Compact must be * * * construed or * * * reformed as to jeopardize the interests of the United States." *Ibid.* Accordingly, the Master's understanding that it is unprecedented for the United States to intervene as a party plaintiff to enforce federal interests and obligations that are protected by an interstate compact is incorrect.

b. The Master has recommended that the United States' claim that New Mexico has violated the Compact should be dismissed because of his view that only an entity that has received an apportionment of water under a compact may sue to enforce it. Here, however, although the Compact does not apportion water to the

United States in the manner that compacts and equitable apportionment decrees typically apportion water to States, the Compact does expressly require New Mexico to deliver a specified quantity of water to a project owned and operated by the United States to fulfill federal purposes, including delivery of water to meet irrigation demands in Texas and thereby effectuate the equitable apportionment of Rio Grande water among the States. In any event, the Master is incorrect.

The Master's conclusion that an entity must receive an apportionment of water to state a claim under an interstate compact, Rep. 221-231, is based primarily on *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), and 515 U.S. 1 (1995). But that case does not support the Master's conclusion or "hold[]" that "in order to state a claim under [a compact]," the United States must assert compact violations that undermine an apportionment of water to the United States itself. Rep. 231.

i. In *Nebraska* v. *Wyoming*, Nebraska brought an original action against Wyoming and Colorado seeking an equitable apportionment of the North Platte River. 325 U.S. at 592-593. The Court granted the United States leave to intervene as a defendant, 304 U.S. 545 (1938) (No. 9, Orig.), and it later rejected the United States' request for its own allocation of water for Reclamation projects on the North Platte River. The Court held that because the United States acquires water rights for Reclamation projects under state law, the United States' water for a project is included within the States' equitable apportionment and does not warrant a separate apportionment of water to the United States. 325 U.S. at 614-616, 629. In 1945, the

Court entered an equitable apportionment decree dividing the water of the North Platte River among the States. *Id.* at 665.

ii. In 1986, Nebraska returned to the Court to enforce the decree. *Nebraska* v. *Wyoming*, 507 U.S. 584, 587 (1993). During that phase of the case, Wyoming challenged the priority date of the Inland Lakes—reservoirs in Nebraska that are part of a Reclamation project. *Id.* at 593-594. The Court granted summary judgment to the United States and Nebraska on claims that, although Reclamation lacked a state storage permit for the reservoirs, Reclamation's practice of storing water in the reservoirs was "necessary to ensure the delivery of the 46,000 acre-feet of water [to Nebraska] envisioned in the apportionment." *Id.* at 595. The Court granted "summary judgment * * * that the decree entitles [Reclamation] to continue its longstanding diversion and storage practices" and that the priority date of the Inland Lakes was a "necessary predicate of the apportionment" that was settled in the equitable apportionment decree. *Id.* at 594-595. The 1993 decision in *Nebraska* v. *Wyoming* thus demonstrates that the United States may enforce an equitable apportionment decree (and, by analogy, an interstate compact) to protect Reclamation project characteristics that are a "necessary predicate" to the apportionment of an interstate stream. *Id.* at 595.

iii. In 1995, *Nebraska* v. *Wyoming* returned to the Court for review of the Master's recommendation on the States' motions to amend their pleadings. 515 U.S. at 1, 6. This Court permitted Wyoming to bring a cross-claim "against the United States alone, alleging that federal management of reservoirs has contravened state and federal law as well as contracts gov-

erning water supply to individual users." *Id.* at 15. The Court agreed with the Master that the cross-claim could go forward because the equitable apportionment decree "was framed based in part on assumptions about storage water rights and deliveries," and Wyoming had alleged that the United States' operation of its projects "ha[d] the effect of undermining Wyoming's apportionment." *Id.* at 16 (citation omitted).

In this case, the Master concluded that *Nebraska* v. *Wyoming* "hold[s]" that an entity may assert claims to enforce an interstate compact only if that entity has its own apportionment of water that is undermined by a compact violation. Rep. 231. But that is not what the Court held. The Court concluded that because Wyoming alleged that the United States' operation of federal projects "undermine[d] the operation of the decree," the State had "state[d] a claim arising under the decree itself" and could proceed with a claim directly against the United States, which had intervened in the original action but had received no apportionment of water under the decree. *Nebraska* v. *Wyoming*, 515 U.S. at 20. If a State can bring claims against the United States under an interstate compact to which the United States is not a party for operating its projects in a way that undermines an equitable apportionment decree, then the United States should be permitted to state a claim arising under the Compact where a State undermines the operation of the Compact's equitable apportionment scheme to the detriment of a project owned and operated by the United States that was a "necessary predicate" for the Compact, 507 U.S. at 595, and that the Compact expressly protects.

B. The United States May Enforce The Compact As A Third-Party Beneficiary

Alternatively, viewing the Compact as a contract among Colorado, New Mexico, and Texas and analyzing the United States' complaint in intervention under contract principles, the United States may bring a claim for declaratory and injunctive relief against New Mexico as an intended third-party beneficiary of the Compact. In addition to being analyzed as federal statutes, "[i]nterstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130 (citing *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987)). Under contract-law principles, "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce th[at] duty." Restatement (Second) of Contracts § 304 (1981).

To establish that it is an intended third-party beneficiary with rights to enforce a contract, "the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Smith* v. *Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000)). Furthermore, the third party must show that the contract "reflects an intention to benefit the party directly." *Klamath Irrigation Dist.* v. *United States*, 67 Fed. Cl. 504, 533 (2005) (quoting *Glass* v. *United States*, 258 F.3d 1349, 1354, opinion modified on reh'g, 273 F.3d 1072 (Fed. Cir. 2001); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912). "It is well-

settled that the United States may be a third party beneficiary to an agreement between two other parties." *West Chelsea Bldgs.* v. *United States*, 109 Fed. Cl. 5, 16 (2013) (holding that United States was a third-party beneficiary to a covenant-not-to-sue agreement) (citing *United States* v. *State Farm Mut. Auto. Ins. Co.*, 936 F.2d 206, 207 (5th Cir. 1991) (holding that United States was a third-party beneficiary to an insurance policy)).

For the same reasons that the United States may enjoin violations of the Compact considered as a federal law that protects federal interests, the United States is an intended third-party beneficiary with enforceable rights under the Compact. Congress required a federal representative to participate in compact negotiations specifically to ensure that the Compact would protect the United States' obligation to deliver water to Mexico and its investment in and operation of the Rio Grande Project. See 1929 Act ch. 520, 45 Stat. 1502; Rep. 120. The Master recognized that Article XVI of the Compact, which protects the United States' treaty obligations to Mexico, "was incorporated to meet the requir[e]ments * * * of the United States." Rep. 170.

The resulting Compact "wholly incorporate[s]" a federal reclamation project and reflects the States' intent that the Project "be the sole vehicle by which Texas and lower New Mexico would receive their equitable apportionments of the Rio Grande waters." Rep. 195; see Rep. 204, 209. The Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination" as irrigation water for Reclamation contract-holders and for Mexico, Rep. 200, and it expressly protects the United

States' obligation to deliver water to Mexico pursuant to the 1906 Treaty, Art. XVI, 53 Stat. 792. Because Reclamation is responsible for releasing water from the Project pursuant to the United States' contract and treaty obligations, those provisions reflect the States' intentions to benefit the United States directly by protecting its ability to carry out those obligations. The United States can thus enforce the Compact as an intended third-party beneficiary.

CONCLUSION

The Court should reject the Special Master's recommendation that the United States' complaint in intervention should be dismissed "to the extent that the United States cannot state a plausible claim under the 1938 Compact." Rep. 237.

Respectfully submitted.

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RECORD
AND
BRIEF

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report of the Special Master

STATE OF COLORADO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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Fed. R. Civ. P. 12 10

JURISDICTION

The State of Texas invoked the Court's original jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. §1251(a).

STATEMENT OF THE CASE

This case involves a dispute between States that are parties to the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. §37-66-101 ("Río Grande Compact" or "Compact"). The Compact apportions the waters of the Río Grande above Fort Quitman, Texas among the three signatory States – Colorado, New Mexico, and Texas. Texas invoked the Court's original jurisdiction to determine whether New Mexico violated the terms of the Compact. Texas also named Colorado as a defendant because it is a signatory to the Compact. Texas stated no claims against Colorado. The United States has been permitted to intervene to protect federal interests implicated by this litigation.

At this preliminary stage, the Court is asked to determine a number of threshold issues. First, it is asked to determine whether to dismiss Texas' complaint. Second, it is also asked to determine whether additional parties, which are neither signatories to the Compact nor otherwise subject to the Court's exclusive original jurisdiction, should be allowed to intervene. These non-Compact entities seeking intervention include two irrigation districts, Elephant Butte Irrigation District ("Elephant Butte District") in New Mexico, and El Paso

County Water Improvement District No. 1 ("El Paso District") in Texas. Through water delivery contracts with the United States, the districts are obligated to manage water deliveries from the Río Grande Project, which is operated by the United States Bureau of Reclamation. Third, the Court is asked to decide whether and to what extent the United States' separate claims against New Mexico should be considered or dismissed in this Compact related proceeding.

Because of the early stage of this litigation, the case is not yet at issue. No parties have filed answers, counter claims, or cross claims. Discovery has not started. The only issues before the Court are the motions to dismiss and to intervene.

The First Interim Report of the Special Master ("Report") recommends the following: deny the motion to dismiss Texas' complaint, grant the motion to dismiss the Río Grande Compact claims of the United States, accept non-exclusive jurisdiction over the non-Compact claims by the United States, and deny the requests for intervention of both Elephant Butte District and El Paso District. Colorado does not take exception to these general recommendations. Specifically, Colorado does not object to the recommendation to deny the motion to dismiss Texas' complaint or to deny intervention of Elephant Butte District and El Paso District. Colorado also does not take exception to the recommendation to dismiss the Río Grande Compact claims asserted by the United States. Likewise, Colorado does not dispute the recommendation to allow the United States to participate; however, contrary to the Report,

the Court should not accept jurisdiction over the United States' federal reclamation law claims. Instead, the Court should allow only the claims of the United States regarding its interests in implementing the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Río Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex. 34 Stat. 2953 ("1906 Convention").

In addition to these recommendations, the Report includes a historical account of the region's irrigation development and negotiation of the Río Grande Compact based on independent investigations by the Special Master. For terms not expressly stated in the Compact, the Report relies on this material to draw conclusions regarding Compact implementation, allocations, and obligations. The Report recognizes, however, that conclusions and findings based on this independent investigation were neither necessary nor considered when reaching the ultimate recommendations contained therein. Colorado therefore requests that the Court affirmatively abstain from adopting the Report's extraneous findings and conclusions as the law of the case until the parties have had an opportunity to introduce and explain the entirety of materials that may be considered relevant to the ultimate disposition of this case.

SUMMARY OF ARGUMENT

This brief addresses only those matters in the Report to which Colorado takes exception. This brief therefore makes two arguments.

First, the Court should limit the claims of the United States to those based on the 1906 Convention. This original action is about the Río Grande Compact and the water apportioned among the signatory States. Resolution of the Compact dispute among the States will address the United States' allegations regarding its reclamation contracts that largely mirror those of Texas about the Compact. The Court should not expand the scope of the case to entertain separate contract claims which would also require the other contracting parties to participate.

Second, when ruling on the Report's ultimate recommendations, the Court should affirmatively abstain from adopting the Report's findings and conclusions about the history of the Río Grande basin and interpretation of various provisions of the Compact. Many of the Report's findings and conclusions were also based on materials not submitted by the parties. Accordingly, the Report indicates that much of the material is not dispositive to its ultimate recommendations. This case, moreover, is not even at issue. The parties should have an opportunity to file responsive pleadings, conduct discovery, present evidence, and make arguments before the many topics in the Report become the law of the case. Otherwise, the parties could be prejudiced by premature statements, based on

incomplete information, that may define the States' rights and obligations under the Compact.

ARGUMENT

I. The Court should limit claims by the United States to its interests in the 1906 Convention with Mexico.

Colorado does not take exception to the Report insofar as it recommends that the United States should be allowed to move forward with claims based on the 1906 Convention. Report at 236. The Río Grande Compact states that it does not affect the United States' obligation to Mexico under existing treaties; therefore, resolution of Texas' Compact claims cannot, as a legal matter, dictate a resolution to allegations regarding the 1906 Convention. See, Río Grande Compact, Art. XVI. Thus, consideration of the United States' claims based on the 1906 Convention is necessary.

However, Colorado takes exception to the Report to the extent it recommends allowing the United States to bring other claims that are not based on the 1906 Convention. Those other claims are based on contracts among the Bureau of Reclamation, Elephant Butte District, and El Paso District for water delivery from the Río Grande Project and are nearly identical to Texas' claims and more properly resolved under the rubric of the Compact by the States.

The Río Grande Project includes reservoirs in New Mexico used to store and deliver water to Elephant Butte District and El Paso District. As the Report explains, the United States' claims will be addressed by litigation among the States.

> The resolution of the 1938 Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues.

Report at 234 (Feb. 9, 2017).

* * *

> [B]oth Texas and the United States allege that the misappropriations of water by New Mexico through her agents and citizens affect and diminish the 1938 Compact's apportionment of water to Texas and, possibly, to Mexico.

Report at 236. The federal reclamation law allegations of the United States deal primarily with effectuating its delivery contracts from the Río Grande Project. United States Complaint at 4 ("New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Río Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts."). Texas' allegations deal with the same subject matter within the context of the

Compact: "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Río Grande Project and under the Río Grande Compact." Texas Complaint at 9.

Importantly, it is the States, and not the United States, that represent the water users, including water from the Río Grande Project, under the Compact. The States are parties to the Compact, which apportioned the water among them:

> The state of Colorado, the state of New Mexico, and the state of Texas, desiring to remove all causes of the present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a compact for the attainment of these purposes. . . .

Río Grande Compact, preamble; see also, Río Grande Compact, Art. I(c) (defining Río Grande basin as all the territory drained by the Río Grande and its tributaries in Colorado, New Mexico, and Texas above Fort Quitman). The States represent the water users within their respective borders. Report at 259, 275; *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945). The water users within each State make use of water available within the Compact apportionment. "The United States has no claim itself to the natural flow of an interstate

stream, as does a State through which the stream passes." Report at 230. See also, *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) ("[The Secretary of the Interior's] rights can rise no higher than those of Wyoming, and an adjudication of [Wyoming's] rights will necessarily bind him."). Therefore resolution of water allocations among New Mexico and Texas in the region below Elephant Butte Reservoir will address the same issues alleged by the United States.

If the United States' contract claims cannot be resolved through the States' Compact litigation, then those claims are sufficiently different and should not be added to this case. First, it would add disputes that are not at issue. "[E]quitable apportionment of the Rio Grande has already been achieved through the States and Congress's ratification of the 1938 Compact." Report at 258. "[T]he contracts between the state water improvement districts and the United States for the management of the Project are not at issue here. Rather, this case centers squarely on the interpretation of the 1938 Compact as to the rights and duties of the sovereign signatory States under the Compact." Report at 272. See also, *Nebraska v. Wyoming*, 515 U.S. 1, 20-21 (1995) (allowing a Wyoming claim against the United States not as a contract dispute but based on claimed injury to its equitable apportionment of the North Platte River). In addition, including the United States' claims may risk allowing the United States to take a position contradictory to the signatory States regarding Río Grande Compact obligations, undermining the positions of the actual parties to the Compact.

Further, including the United States' claims may require the Court to add the very parties to which the Report recommends denying intervention because Elephant Butte District and El Paso District are also parties to the Río Grande Project contracts. This would greatly expand the scope of litigation and go against the Report's recommendation to not allow intervention of the irrigation districts. Also, resolving the Compact dispute first would allow the United States and the other contracting parties, Elephant Butte District and El Paso District, to then resolve their water delivery disputes within the parameters of the Río Grande Compact's apportionment. Because the boundaries of each of the irrigation districts sit entirely in either New Mexico or Texas, any contracted delivery of water from the Río Grande Project must be consistent with how the Compact apportions water among the States. *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938).

II. The parties should have the opportunity to conduct discovery, present evidence, and make arguments on the issues before the Court accepts the findings and conclusions in the Report as the law of the case.

The Report admittedly contains findings and conclusions beyond what was necessary to resolve the motions. Those findings and conclusions are based upon independent investigation by the Special Master and do not rely upon evidence submitted by the parties. The Court should refrain from adopting such findings

and conclusions of the Report until the parties have the opportunity to conduct discovery, present evidence, and make arguments on those issues.

The Report confirms that it contains extraneous material: "[T]his report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report," and "[N]o need exists to rely upon the history of the 1938 Compact to interpret that language." Report at 193, 203. Colorado agrees that those findings and conclusions are not necessary to resolve the issues currently before the Court. At this stage, the only issues to resolve include whether Texas or the United States has failed to state a claim, and whether the irrigation districts should be allowed to intervene. Statements about the development of irrigation in the West, origins and evaluation of the prior appropriation system, the history of the Compact and its negotiation, the intentions of the States, and the overall allocation scheme of the Compact are not necessary to resolve the motions. Accordingly, the Court need not, and should not, accept these findings and conclusions in the Report in order to rule on its ultimate recommendations. See, Report at 193, 203.

Colorado is not asserting that it necessarily disagrees with the type of findings and conclusions in the Report. Rather, in light of the nascent stage of the proceedings and undeveloped nature of the issues, the

State simply cannot determine whether and to what extent it may take issue with such determinations at this time. By acknowledging that the contents of the Report are not presently adopted as the law of the case, the Court gives the parties an opportunity to develop the case, conduct discovery, and present evidence that may inform the ultimate conclusions relevant to the issues that arise. This, in turn, may help provide information needed for the Special Master to eventually draft future recommendations regarding these issues, should they be necessary.

Colorado asks the Court to affirmatively abstain from adopting the findings and conclusions of the Report in order to avoid the potential for any prejudice that may otherwise be created by accepting the entirety of the Report at this stage in the litigation. Many of the materials used to support statements in the Report were gathered independently, and some may remain unknown to the parties. Colorado likewise has not yet had the opportunity to conduct discovery or present its own evidence on many issues discussed in the Report.

The relevance of this request is not limited to the specifics of this case. Accepting reports with extensive independent preliminary evaluations could also prejudice parties in future original actions. With a case not yet fully developed through pleadings, discovery, presentation of evidence, and argument, extensive findings and conclusions developed through independent investigation present the possibility of unknown risks to parties. Accepting a report as law of the case

on issues not required for resolution may unintentionally bind parties on issues not before the Court. It may also create future disputes if a report makes statements regarding accepted practices about which a special master is unaware.

In addition, if an entire compact is subject to evaluation and resolution before the case becomes at issue, then the pleadings would not serve to frame the dispute. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (explaining that, especially in an original action, the pleadings serve to limit the scope of a dispute under the Court's exclusive jurisdiction). This could increase the number of issues presented in a suit, force States to make an entire compact the subject of a suit regardless of the extent of existing disputes, and argue the entire case at the first available opportunity. Such an approach prevents developing a case through discovery and limiting a suit to actually disputed issues.

Allowing the parties to conduct discovery and present evidence on the issues relevant to this case, and accepting the Report only for its ultimate recommendations, will allow the Court to resolve the outstanding motions without being hamstrung by premature determinations or causing prejudice to the parties.

CONCLUSION

The Court should: (1) limit the claims of the United States to those regarding the 1906 Convention and (2) state that it is not adopting the findings and conclusions within the Report as the law of the case.

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On Exceptions to the First Interim Report of the Special Master

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NEW MEXICO'S EXCEPTIONS

The Special Master recommends in his First Interim Report ("Report") that: (1) the State of New Mexico's Motion to Dismiss Texas's Complaint be denied; (2) the State of New Mexico's Motion to Dismiss the United States' Complaint in Intervention be granted to the extent that the United States cannot state a claim under the Rio Grande Compact ("Compact"); (3) the Court extend its original, but not exclusive, jurisdiction to allow for resolution of the United States' claims under federal reclamation law; and (4) the Motions for Leave to Intervene of Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EPCWID") be denied. The State of New Mexico accedes to the recommendations of the Special Master that its Motion to Dismiss Texas's Complaint be denied, that its Motion to Dismiss the United States' Complaint in Intervention be denied to the extent that the Court extends its original jurisdiction to allow resolution of the United States' claims under federal reclamation law, and that the Motions to Intervene of EBID and EPCWID be denied. Accordingly, the State of New Mexico recognizes that the case will move forward to resolve claims among Texas, New Mexico, and the United States.

Nevertheless, the reasoning articulated in the Report is flawed in several significant respects and far exceeds the scope properly considered in evaluating a Motion to Dismiss. To ensure that this flawed and unnecessary reasoning is not adopted by the Court, the State of New Mexico takes exception to the First

Interim Report of the Special Master with respect to the following:

1. The conclusion that the Compact requires New Mexico to relinquish all jurisdiction over Rio Grande water upon delivery to Elephant Butte Reservoir;

2. The conclusion that the Compact overrides Congress's command in the Reclamation Act for federal reclamation projects to comply with and defer to state water law, including state water adjudication and administration;

3. The conclusion that the doctrine of equitable apportionment supersedes New Mexico's sovereignty over the waters of the Lower Rio Grande within the boundaries of New Mexico; and

4. The reliance on facts unnecessary for the Report's recommendations on the pending motions and the determination of historical facts obtained independently by the Special Master without affording the parties an opportunity to review, verify, object to, or present countervailing evidence.

The Court should enter an order denying the Motion to Dismiss Texas's Complaint, granting the Motion to Dismiss the United States' Complaint in Intervention but also adopting the Special Master's recommendation to extend jurisdiction over the United States' claims under 28 U.S.C. § 1251(b)(2) while at the same time precluding the United States from relitigating its water rights for the Rio Grande Project

("Project") in these proceedings, denying the Motions to Intervene of EBID and EPCWID, and recommitting the case to the Special Master, stating affirmatively that any findings or conclusions specified in the Report are not the law of the case. The Court should expressly refrain from adopting the Report and reserve judgment on all issues that need not, and should not, be determined at this preliminary stage of the litigation.

Respectfully submitted,

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim
Report of the Special Master

BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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STATEMENT

I. Factual Background

A. The Rio Grande Basin

The Rio Grande rises in Colorado and flows southward through New Mexico into Texas, where it forms the boundary between Texas and the Republic of Mexico.[1] National Resources Committee, Regional Planning, *Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 7 (1938) ("Joint Investigation"). The river contains two major basins: the Upper Basin, extending from the Rio Grande's headwaters in Colorado to a narrow gorge just below Fort Quitman, Texas, and the Lower Basin, extending from Fort Quitman to the Gulf of Mexico. *Id.* The Compact divides the waters of the Upper Basin among Colorado, New Mexico, and Texas.

B. The Rio Grande Project

Due to persistent and controversial water shortages in the portion of the Upper Basin between Elephant Butte Reservoir and Fort Quitman (the "Lower Rio Grande" or "LRG"), the United States Bureau of Reclamation ("Reclamation") determined to construct a dam and reservoir near Engle, New Mexico, roughly 100 miles north of the New Mexico-Texas state line.

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[1] In offering brief factual statements for context, New Mexico here relies on documents previously lodged with the Court or submitted by the parties.

Act of February 25, 1905, ch. 798, 33 Stat. 814. The United States filed notices of appropriation with the New Mexico Territorial Engineer in 1906 and 1908 seeking rights under New Mexico law to appropriate water for the planned reservoir.[2] Letter from B.M. Hall, Reclamation Service Supervising Engineer, to David L. White, Territorial Irrigation Engineer of New Mexico (Jan. 23, 1906) (Motion to Dismiss App. 8); Letter from Louis C. Hill, Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico (April 28, 1908) (Motion to Dismiss App. 11).

Construction of Elephant Butte Reservoir ("Elephant Butte") was completed in 1916. Joint Investigation at 8. Elephant Butte is the main storage feature for the Project, but the Project also includes a smaller reservoir (Caballo Reservoir), several diversion dams, and other infrastructure. United States Bureau of Reclamation, Rio Grande Project (last visited June 4, 2017), *available at* https://www.usbr.gov/projects/index.php?id=397. Since its completion, the Project has been operated as a cohesive unit despite its interstate nature. An agreement executed in 1938, prior to the Compact's adoption, confirmed that the farmers in New Mexico, represented by EBID, would receive 57 percent of Project water deliveries, while the farmers in Texas, represented by EPCWID, would receive 43 percent,

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[2] Filing notices of appropriation was in keeping with Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and the territorial code of New Mexico, 1905 N.M. Laws ch. 102, § 22 and 1907 N.M. Laws ch. 49, § 40.

based on the ratio of irrigable Project acres located in each State. U.S. Resp. App. 1a-4a.

C. The Rio Grande Compact

The States began negotiating a Compact to apportion the river in 1923. Joint Investigation at 8. While negotiations for a permanent compact were proceeding, the States executed a temporary compact in 1929 to govern the river. Act of June 17, 1930, ch. 506, 46 Stat. 767 (1929). In 1935, the United States Natural Resources Committee was directed to conduct a detailed hydrological survey of the Upper Rio Grande Basin, which resulted in the Joint Investigation. Joint Investigation at 10. The States began negotiations in earnest for a final compact in 1937, working from a draft copy of the Joint Investigation. *Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico* at 3 (Sept. 27 to Oct. 1, 1937).

The Compact was signed on March 18, 1938. The signatory States ratified it the following year, as did Congress. 1939 Colo. Sess. Laws 489; 1939 N.M. Laws 59; 1939 Tex. Gen. & Spec. Laws 531; Pub. L. No. 96, ch. 155, 53 Stat. 785 (May 31, 1939). The Compact contains sixteen articles that define and describe its scope.

Purporting to effect "an equitable apportionment" of the "waters of the Rio Grande above Fort Quitman, Texas," Compact Preamble, the Compact includes a series of gaging stations on the Rio Grande between Del Norte, Colorado in the north, and just below Caballo Reservoir in New Mexico in the south. Compact Art. II.

The Compact establishes two delivery schedules, one on the mainstem of the Rio Grande and another on the Conejos River, for Colorado to deliver the combined waters of these two rivers at the Lobatos gaging station, near the Colorado-New Mexico state line. *Id.* Art. III. Pursuant to Article IV, New Mexico is then obligated to deliver a portion of water measured at its upper index river gaging station at Otowi Bridge to Elephant Butte.[3] Article V authorizes the Rio Grande Compact Commission ("Commission") to abandon any of the gaging stations specified in Article II and establish new gaging stations if doing so will not substantially change the parties' rights and obligations to deliver water.

Article VI establishes a system of credits and debits for New Mexico and Colorado, and also describes the manner in which accrued debits and credits attributed to New Mexico and Colorado are addressed in an actual or hypothetical spill of water from Elephant Butte. Article VII prohibits either upstream State from increasing the amount of water it stores in reservoirs constructed after 1929 whenever there is less than 400,000 acre-feet of usable water in Project storage, except under certain specified conditions. Article VIII

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[3] In 1948, the Rio Grande Compact Commission resolved, pursuant to Article V, to change the point of New Mexico's delivery from San Marcial, as specified in Article IV of the Compact, to Elephant Butte, due to difficulties maintaining the gaging station at San Marcial. Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

allows Texas to demand of Colorado and New Mexico each January, and New Mexico to demand of Colorado, that the upstream State(s) release water from post-1929 reservoirs, but this right is limited to the lesser of the amount of the upstream State's accrued debits or the amount needed to bring the amount of usable water in Project storage to 600,000 acre-feet by March 1st and maintain this quantity in storage until April 30th. The remaining articles address imported water, the role of the Commission and other matters.

II. Legal Background

The prior appropriation doctrine governs the use of surface water in all three of the Compact's signatory States. COLO. CONST. art. XVI, §§ 5-6; N.M. CONST. art. XVI, §§ 2-3; Tex. Water Code Ann. §§ 11.021, 11.022, 11.027. Prior appropriation laws share certain fundamental characteristics. These include recognition that actual beneficial use of water vests a priority to continue that use which is superior to those whose uses began on a later date and is subordinate to those whose uses began earlier. *Walker v. United States*, 162 P.3d 882, 888 (N.M. 2007); N.M. CONST. art. XVI, § 3.

In New Mexico, the acquisition and use of both surface water and groundwater is subject to the doctrine of prior appropriation. *See Yeo v. Tweedy*, 286 P. 970, 974 (N.M. 1929). Although managed conjunctively, surface water and groundwater are treated as distinct sources of water under New Mexico law, as they are in most prior appropriation states, and separate rules

govern the appropriation of surface water and groundwater.[4]

State prior appropriation laws play a central role in the construction and operation of federal reclamation projects pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388. For example, the Reclamation Act provides "beneficial use shall be the basis, the measure, and the limit of the right" to "the use of water acquired under the provisions of this Act." 43 U.S.C. § 372. The Reclamation Act also requires the United States to "proceed in conformity with" the laws "of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." *Id.* § 383.

III. Previous and Ongoing Litigation

The signatory States have engaged in several prior original actions before this Court related to the Compact. *See Texas v. New Mexico*, No. 10, Original (1935) (dismissed upon ratification of the Compact); *Texas v. New Mexico*, No. 9, Original (1951) (dismissed for failure to join the United States); *Texas and New Mexico v. Colorado*, No. 29, Original (1967) (dismissed by stipulation of the parties following an actual spill

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[4] Separate legal regimes governing the appropriation of groundwater and surface water are common in Western states. Technology to utilize groundwater on a large scale was not developed until the 1920s and 1930s and was not widely employed until the 1950s, so "groundwater law developed separately from the law of surface water rights." A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 6.1 (2011).

from Elephant Butte in 1985 and associated cancellation of Colorado's accrued debits).

Two lower courts in New Mexico have also considered the Compact's terms. In *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), the court interpreted Article IV to mean that "New Mexico is not required to deliver anything at the New Mexico-Texas state line. New Mexico's only delivery obligation is set forth in Article IV of the Compact, which designates Elephant Butte Reservoir as the point of delivery." *Id.* at 385. The court also discussed the critical issue of groundwater pumping in the Lower Rio Grande, which is at the heart of Texas' Complaint in this case. The court observed that the Compact "makes no mention of ground water" and that Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply." *Id.* at 387. The court concluded that "[i]ssues of impairment of prior water rights – surface or ground, within the Project or without – and measures for offsetting impairments should be addressed in administrative hearings. . . ." *Id.* at 388.

The New Mexico Court of Appeals in *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372 (N.M. Ct. App. 1993) ("*Regents*"), interpreted the Compact in a similar fashion:

> The Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the

> state line. As a result, the compact does not apportion a specific quantity of water between the two states. Texas apparently believed that delivery at the dam was preferable because the Rio Grande Project contracts independently apportioned water below the dam for both New Mexico and Texas users.

Id. at 378 (internal citations omitted).

IV. Adjudication of Water Rights in Texas and New Mexico

Both New Mexico and Texas have adjudicated or are adjudicating water rights within the Project area in their respective jurisdictions. *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (3rd Judicial Dist. Doña Ana County, NM) ("LRG Adjudication");[5] *In re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, Final Decree (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006) ("Texas Adjudication"); Texas Commission on Environmental Quality, Certificate of Adjudication

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[5] A water adjudication in New Mexico is a complex procedure, involving designation of a stream basin, joinder of all known water claimants in the basin, a hydrographic survey of the basin by the State Engineer, resolution of basinwide issues, determination of the characteristics – for example, validity and relative priority – of each claimant's right to water, and entry of a comprehensive decree describing the adjudicated rights. Brigette Buynak & Darcy Bushnell, *Adjudications*, Water Matters! (2014), *available at* http://uttoncenter.unm.edu/projects/water-matters.php.

No. 23-5940 (Mar. 7, 2007) (EPCWID Motion to Intervene App. 1-15). New Mexico's adjudication was initiated in 1986, but attempts by the United States to dismiss or evade the adjudication delayed progress in the case. The United States originally argued the LRG Adjudication did not meet the technical requirements of the McCarran Amendment, 43 U.S.C. § 666, but *Regents* affirmed the proposed adjudication could be considered a "river system" for purposes of the McCarran Amendment, and refused to dismiss the United States. 849 P.2d at 378-79. Rather than accept New Mexico's jurisdiction, the United States then sought to quiet title to the Project's water right in federal court. *See United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002). The district court abstained in favor of the LRG Adjudication, and the Tenth Circuit Court of Appeals affirmed the abstention.[6] *Id.*

Since then, New Mexico has invested substantial resources in the LRG Adjudication. The LRG Adjudication court recently determined the elements of the United States' Project rights. After extensive litigation, including detailed historical testimony, the LRG Adjudication court ruled on the sources of Project water, the amount of Project water, and the priority date for the Project. LRG Adjudication, Orders filed August 16, 2012; February 17, 2014; April 17, 2017.

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[6] By contrast, the United States has apparently acquiesced to Texas' adjudication of surface water rights without protest.

V. The Present Dispute

Since approximately 1950, hundreds of groundwater wells have been drilled in both the Texas and New Mexico portions of the Lower Rio Grande. Prior to 2008, the effects of this groundwater pumping were taken into consideration through a Project delivery calculation made by the United States. In 2008, Reclamation adopted a new operating agreement for the Project that, among other things, modified the method of accounting for changes in surface water delivery efficiencies related to groundwater pumping. U.S. Bureau of Reclamation, Dep't of the Interior, *Operating Agreement for the Rio Grande Project* (Mar. 10, 2008) ("2008 Operating Agreement"), *available at* https://www.usbr.gov/uc/albuq/rm/RGP/pdfs/Operating-Agreement2008.pdf. The procedures in the 2008 Operating Agreement, however, inequitably assess all delivery efficiency reductions against New Mexico, despite the material effect that groundwater pumping in northern Texas has on delivery efficiencies in both States. This has resulted in a radical alteration of the historical 57/43 percent allocation of Project water among New Mexico and Texas beneficiaries.

To address these concerns, as well as Reclamation's unlawful release of a portion of New Mexico's Compact credit water to Texas, New Mexico challenged the 2008 Operating Agreement in federal district court. Complaint, *New Mexico v. United States*. No. 11-CV-0691 (D.N.M. Aug. 8, 2011). This action is currently stayed pending clarification of the scope of this case.

Memorandum Opinion and Order, *New Mexico v. United States*, No. 11-CV-0691 (D.N.M. Mar. 29, 2013).

In 2013, Texas sought leave to file a complaint against New Mexico, alleging groundwater pumping and other unspecified diversions in New Mexico south of Elephant Butte have intercepted Project water "intended for use in Texas." Tex. Compl. ¶ 4. Texas argues these diversions violate the "purpose and intent" of the Compact, *id.*, including the "fundamental purpose of the . . . Compact . . . to protect the Rio Grande Project and its operations under the conditions that existed in 1938," *id.* ¶ 10, and an unstated but binding obligation that "delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *Id.* ¶ 18. Texas further claims New Mexico's actions violate "New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing." *Id.* ¶ 21. New Mexico opposed Texas' Motion for Leave to File on the basis that, *inter alia*, Texas' claims were not based on the express terms of the Compact but were instead a request that this Court rewrite the Compact. The Court granted Texas leave to file, but also allowed New Mexico to file a motion to dismiss Texas' Complaint. Order of Jan. 27, 2014.

The United States moved to intervene as a plaintiff, alleging in its proposed complaint that New Mexico groundwater diversions in the Lower Rio Grande intercepted Project water, reducing Project efficiency

and violating provisions of reclamation law requiring a contract with the Secretary to receive deliveries of Project water. U.S. Compl. ¶¶ 12-14. The Court granted the United States leave to intervene. Order of Mar. 31, 2014.

New Mexico moved to dismiss both complaints, arguing the conduct alleged by Texas and the United States did not violate the Compact but instead had its proper remedies under reclamation and state law. Motion to Dismiss ¶¶ 1-3. After briefing on the Motion to Dismiss was complete, the Court referred New Mexico's Motion to Dismiss to the Special Master. Order of Nov. 3, 2014. The Court also referred the subsequently filed motions to intervene of EBID and EPCWID to the Special Master. Orders of Apr. 27, 2015; Oct. 5, 2015. On February 13, 2017, the Special Master submitted the Report to the Court addressing New Mexico's Motions to Dismiss and the motions of EBID and EPCWID to intervene.

SUMMARY OF ARGUMENT

While New Mexico accepts the Special Master's proposed disposition of the motions pending before the Court, it opposes any recognition or adoption by the Court of the unnecessary factual and legal statements contained in the Report. The Special Master's task at this preliminary stage is to determine whether Texas's and the United States' Complaints should be dismissed for failure to state a claim upon which relief

may be granted. In his Report, the Special Master rendered numerous determinations not required to decide that narrow question. The Report misapplies or contravenes relevant statutes and case law and exceeds the proper scope of factual findings on a motion to dismiss, and the case should be remanded to the Special Master for proceedings on the merits without adoption of the Report.

Section I demonstrates that the plain text and the structure of the Compact do not require New Mexico to relinquish all jurisdiction over water below Elephant Butte upon the delivery of water to the Project. In his discussion of the Compact, the Special Master finds that New Mexico's stated obligation to "deliver" water to Elephant Butte results in a complete abdication of control or authority over such water. Such a view misunderstands the nature of usufructuary water rights versus standard property rights. It improperly reads absent conditions into the Compact with the effect of depriving a State of sovereignty over its own resources in contravention of well-established principles of interstate compact interpretation.

Section II explains how the Report's conclusion contravenes the clear mandate of Section 8 of the Reclamation Act of 1902, which specifies that state law controls the appropriation and distribution of water for federal reclamation projects. Since the passage of this Act, this Court has consistently recognized Congress' purposeful and continued deference to state water law concerning federal reclamation projects to avoid the

confusion that would arise if federal law and state water law reigned side by side in the same locality. By incorporating the Project, the Compact incorporates the body of law governing the Project, namely the Reclamation Act, which provides that state law controls the appropriation and distribution of water from federal reclamation projects. The Report also ignores decades of federal law and policy by suggesting a federal determination of the nature and extent of the Project rights. Although New Mexico acquiesces in the Special Master's recommendation that the United States continue to participate in this case for the purpose of assessing whether its Project rights have been depleted, New Mexico strongly excepts to any suggestion that the work of the state adjudication court in determining the nature and extent of the United States' Project rights has been preempted. The McCarran Amendment, 43 U.S.C. § 666, expresses a clear federal policy that state courts are the appropriate forum for the adjudication of state water rights.

In Section III, New Mexico explains how the Report misinterprets this Court's jurisprudence on equitable apportionment by concluding that, because the Compact equitably apportioned the waters of the Rio Grande, New Mexico law cannot apply to the administration of Rio Grande water below Elephant Butte. Contrary to the Special Master's conclusion that the Compact effectively overrides state law, state engineers in Western states routinely administer water

rights to comply with both state law and compact obligations, and doing so is in keeping with a long line of precedent.

Section IV discusses the fact that the Special Master's historical analysis far exceeds the scope of what is proper in ruling on a motion to dismiss. The Special Master's use of untested extrinsic evidence deprived the parties of the ability to review, verify, object to, or present countervailing evidence. If the Report's historical discussion is adopted, it will prejudice the course of the litigation going forward. And finally, in Section V, New Mexico explains that while it accepts the Special Master's recommendation that the Court extend its nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claims, the United States should not be allowed to relitigate its settled water right for the Project in this forum.

In light of these issues, New Mexico respectfully requests that the Court decline to adopt the Report except for its ultimate recommendations regarding the motions pending before the Court, state affirmatively that any findings or conclusions in the Report are not law of the case, and return the case to the Special Master for full development and vetting of the historical record and the legal issues involved.

ARGUMENT

I. NEW MEXICO EXCEPTS TO THE SPECIAL MASTER'S FLAWED REASONING THAT THE COMPACT'S USE OF THE WORD "DELIVER" STRIPS NEW MEXICO OF ITS SOVEREIGN AUTHORITY OVER WATER WITHIN THE STATE.

New Mexico agrees with the proposition that the Compact relied on the Project as the mechanism through which Project waters below Elephant Butte were distributed.[7] However, the Report contains analytical errors that threaten to divest New Mexico of sovereignty over waters within its borders. New Mexico emphatically disagrees with any implication that it relinquished or impaired its sovereignty by entering into the Compact simply because the Project is implicitly incorporated in the Compact. The plain text of the Compact does not in any way support such a relinquishment. Moreover, this Court's precedent strongly disfavors reading in such an implied relinquishment, as does federal law generally. The Report's interpretations of the Compact and federal law suggesting otherwise are mistaken. This Court should reject the finding

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[7] The point of the Motion to Dismiss was not to object to the proposition that the Project was central to the Compact, or to assert that New Mexico had no obligation to curtail unauthorized water use that could affect the Project. Rather, it was to argue that, under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and state law. *See City of El Paso v. Reynolds*, 563 F. Supp. at 379.

that the Compact impaired New Mexico's sovereign administrative control over waters within its borders.

A. The plain text of the Compact does not support the conclusion that New Mexico relinquishes all jurisdiction over water upon delivery to the Project.

Interstate compacts are construed under contract-law principles, and a compact's express terms are "the best indication of the intent of the parties." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("*Tarrant*"). The Court has recognized that interstate compacts are the products of careful negotiations between sovereign States. It is therefore reluctant to imply obligations or requirements that are not contained in the plain language. *See New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008).

The Court explained in *Alabama v. North Carolina*, 560 U.S. 330 (2010):

> We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation of powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented.

560 U.S. at 352 (internal citations omitted) (noting previous cases in which the Court refused to order relief

inconsistent with the express terms of a compact, regardless of the equities of the circumstances); *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("'[N]o court may order relief inconsistent with [an interstate compact's] express terms' no matter what the equities of the circumstances might otherwise invite." (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). Thus, interpretation of the Compact must begin with its "express terms." *Texas v. New Mexico*, 462 U.S. at 564; *see Tarrant*, 133 S. Ct. at 2130.

If an interstate water compact is silent on a matter, the Court presumes that the signatory States intended to retain and protect their sovereignty over their water. *Tarrant*, 133 S. Ct. at 2132. As *Tarrant* recognizes: "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that if any inference at all is to be drawn from such silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Id.* (internal quotations, citations, and alterations omitted). In construing the Compact here, however, the Special Master infers from the Compact that New Mexico has "relinquish[ed] control and dominion" over its waters. Report at 197. This inference flatly contradicts *Tarrant's* stated principle that State sovereignty is retained unless expressly disclaimed.

1. The Report misinterprets the term "deliver."

Article IV, as modified by the 1948 resolution, requires New Mexico "to deliver water in the Rio Grande" at Elephant Butte. Water delivered to Elephant Butte does not move directly into Texas. Instead, it flows through New Mexico for more than 100 miles before it reaches Texas. Project rights in New Mexico are, and always have been, acquired under and governed by New Mexico law. Rio Grande water within the Project continues to serve New Mexico citizens below Elephant Butte before arriving at the Texas state line, so an interpretation of "delivery" that requires total surrender of New Mexico's sovereign authority to adjudicate and administer water rights within the State cannot be reconciled with the Compact's language or its historical application. Nor would such surrender make sense as a practical matter, as New Mexico must retain jurisdiction in order to shepherd water to Texas.

In construing the word "deliver," the Special Master errs by relying on common dictionary definitions of the term, inappropriately treating water rights as simple property rights and failing to consider the implications of a "delivery" in a prior appropriation system. This leads the Special Master to the erroneous conclusion that New Mexico, by entering the Compact, must "relinquish control and dominion" over the water it delivers, and that "New Mexico state law does not govern the distribution of the water apportioned by the Compact." Report at 197, 216. This novel interpretation is inconsistent with both federal and

state precedent and would create a dangerous precedent if a State can be deemed to have truly ceded this level of sovereignty without explicitly agreeing to do so.

2. Applying common dictionary definitions to interpret the term "deliver" is inappropriate in this context.

In the absence of a Compact definition, the Report relies on a 1930s dictionary definition of "deliver": "'To deliver property to another means to surrender it to that person. To give with one hand and to take back with the other is no delivery.'" Report at 196 (quoting BALLENTINE'S LAW DICTIONARY 353 (1930)). Looking to another contemporary source, the Report notes that delivery was defined as "'[t]o give or transfer; to yield possession or control of; to part with (to); to make or hand over . . . to commit; to surrender.'" *Id.* (quoting WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 963 (1934)). The Report then uses these definitions to suggest that New Mexico relinquishes all control of water in the Rio Grande after it arrives at Elephant Butte, a position that cannot stand in the greater context of the Compact or in the context of the prior appropriation doctrine.

The core problem with applying these dictionary definitions to the Compact, and interpreting the term "deliver" as requiring complete relinquishment of control, is that it treats the waters of the Rio Grande as tangible property the State is obligated to simply

deliver like a deed or convey like land. Instead, as federal courts have repeatedly recognized, water rights in the West are not simple property rights; they are usufructuary rights. "Under the prior appropriation doctrine, a water right is a usufructuary right, and is in no sense a right of ownership of the corpus of the water itself." *Pub. Serv. Co. of Colo. v. F.E.R.C.*, 754 F.2d 1555, 1566 (10th Cir. 1985) (citing Hutchins, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES at 151 (1971)); *see also Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605-06 (10th Cir. 1940) (applying New Mexico law). The Special Master should have considered instead the contemporary definition of "usufruct," which is "the right of enjoying a thing, *the property of which is vested in another*." BLACK'S LAW DICTIONARY 1191 (2d ed. 1910) (emphasis added).

Water is owned by the States for public use, and water users obtain a right through beneficial use. "[New Mexico] controls the use of water because it does not part with ownership; it only allows a usufructuary right to water." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1132 (10th Cir. 1981) (citing *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88 (N.M. 1977), overruled on other grounds by *C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc.*, 811 P.2d 899 (N.M. 1991)). The United States obtained a Project surface water right in accordance with state law some thirty years before the Compact's adoption. New Mexico had already been "delivering" water to the Project for more than two decades when the Compact was adopted. The

only change effected by Article IV was to fix the manner in which the amount of water to be delivered to the Project was calculated. There is no indication in the plain language of the Compact that by agreeing to continue something it was already doing, New Mexico agreed to cede its ownership of the water it delivered but which was still located within its borders for more than 100 miles.

The principle that ownership of water is vested in the public is enshrined in New Mexico's constitution. N.M. CONST. art. XVI, § 2. This is in keeping with New Mexico's long history of water use and the scarcity of water in the State. Neither New Mexico's Compact negotiators nor its legislature would have ignored this bedrock principle by adopting a compact with the meaning suggested by the Special Master.

3. The Special Master's interpretation of the term "deliver" is inconsistent with the historical and practical operations of a federal reclamation project.

If the State has "relinquish[ed] control and dominion" over water within the New Mexico portion of the Project as concluded by the Special Master, Report at 197, the only alternative is for that control and dominion to have passed silently to the United States, as the Report suggests. *Id.* at 216-17. This would be a wholly unprecedented situation. Both state and federal law

make clear that water delivered to a Reclamation project is not surrendered to the United States, as the Special Master recognizes elsewhere in the Report. *See* Report at 230 (concluding the United States "received no apportionment of Rio Grande water through the Compact" and "obtained the water rights on which the Rio Grande Project rests in compliance with New Mexico state law pursuant to the 1902 Reclamation Act").

This Court has held in other interstate water disputes that the United States does not assume control or ownership of water from a State simply because the water runs into a Reclamation project. In *Nebraska v. Wyoming* the Court observed:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

325 U.S. 589, 614 (1945) (citing *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937)). The Court further explained that ownership of the water could not pass to the United States simply by virtue of running through a Reclamation project because "[Section] 8 of the Reclamation Act

provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'" *Id.* That is, the water right belongs to the end user, the farmer or irrigator, rather than the United States because the right derives from beneficial use.

Instead, the government becomes a "carrier or trustee" for the landowners the project serves. *Holguin*, 575 P.2d at 91-92 ("The water was not appropriated for the use of the government but for the use of the landowners. The government was only a carrier or a trustee for the owners"). In New Mexico, "water belongs to the state which authorizes its use," *id.* at 92, and New Mexico, as the owner of the water, "has the right to prescribe how it may be used." *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957). This state administrative control and dominion over water was a foundation of the Project and is essential to the practical workings of the Project. The Special Master's finding that this authority was given up by entering into the Compact must be rejected.

New Mexico recognizes that, in entering the Compact, Texas bargained for an apportionment of Rio Grande water. New Mexico's argument has never been that it may simply deliver water to Elephant Butte and then recapture that water for use in New Mexico with no regard for Texas' Compact rights. Such an interpretation would be untenable. However, the Report's interpretation that New Mexico must relinquish its

sovereign authority and ability to administer the waters within its borders upon delivery to Elephant Butte produces an equally untenable result. No state would agree to silently relinquish its sovereignty in this manner, and such a conclusion flies in the face of the plain language of the Compact, the behavior of the parties, and this Court's precedent. To the extent the Report interprets "delivery" of water to Elephant Butte to require abrogation of New Mexico's sovereign authority over the water that is delivered to Elephant Butte and flows through southern New Mexico, New Mexico must respectfully take exception.

B. This Court's principles of compact interpretation preclude compact interpretations that silently limit state sovereignty.

The Special Master not only misapplies the term "deliver," but also fails to heed this Court's well-established principle that interstate compacts must be interpreted to preserve State sovereignty in the absence of any express terms to the contrary. *See Virginia v. Maryland*, 540 U.S. 56, 67 (2003); *New Jersey v. New York*, 523 U.S. at 783 n.6. This principle is explored in-depth in this Court's recent decision in *Tarrant*.

In *Tarrant*, the plaintiff Texas water district argued it had the right, under the Red River Compact, to appropriate Red River water within Oklahoma's borders for use in Texas, notwithstanding Oklahoma statutes restricting the export of water from the State. 133 S. Ct. at 2129-30. The Red River Compact created a

basin, Subbasin 5, partially located in each signatory State and gave each signatory "equal rights" to the use of water in Subbasin 5 above a certain amount. *Id.* The water district argued that, because the Red River Compact made no mention of state borders with respect to Subbasin 5, the compact authorized cross-border diversions within Subbasin 5 and superseded the Oklahoma statutes in question. *Id.*

The Court found the water district's arguments unpersuasive. *Id.* at 2132. First, the Court recognized that "a State does not easily cede its sovereignty," and "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" *Id.* (quoting *Virginia v. Maryland*, 540 U.S. at 67). *Tarrant*, accordingly, rejected the Texas water district's argument that the compact's silence regarding the effect of state borders in Subbasin 5 indicated the signatories had "dispensed with the *core state prerogative* to control water within their own boundaries." *Id.* at 2132-33 (emphasis added). "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Id.* at 2133.

Second, the Court observed that several other interstate compacts included terms creating cross-border relationships and defining how those relationships would operate. *Id.* at 2133-34. The Court reasoned that these compacts stood in stark contrast

to the Red River Compact, which included no such detailed terms, and found that "the absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the States' agreement." *Id.* at 2134. Third, no signatory had ever requested a cross-border diversion pursuant to the compact until the water district filed its lawsuit. *Id.* at 2135.

Similar circumstances are present in this case. First, the Compact contains no terms providing that New Mexico cedes its sovereign jurisdiction over water south of Elephant Butte or conferring such jurisdiction on another entity. Although it contains provisions protecting deliveries to Elephant Butte, it contains no terms even mentioning uses of water below Elephant Butte other than to note in the definition of "usable water" that this water is "available for release in accordance with irrigation demands, including deliveries to Mexico." Compact Art. I(l). In the face of the Compact's "inscrutable silence" regarding administration of Rio Grande water in New Mexico below Elephant Butte, the Special Master should have adopted an interpretation of the Compact that preserves New Mexico's sovereignty over its water resources, as the Court did in *Tarrant*.[8]

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[8] This includes groundwater. While New Mexico has not disputed the United States' right to include seepage and return flows as part of the Project's water supply, determining the interplay between New Mexico's sovereignty over groundwater and the United States' rights to seepage and return flows will require considerable further factual development and legal analysis.

Second, the Compact contains no terms establishing who has administrative authority over water in the Lower Rio Grande or what the contours of that authority are. If the signatories had intended to vest the United States or anyone else with regulatory authority over all water uses in the Project area (which includes the area within EPCWID in Texas), they would have included provisions "critical for managing the complexities," *id.* at 2134, of such a novel arrangement. "The absence of comparable provisions" in the Compact "strongly suggests" that devolution of state regulatory authority was "never intended to be part of the States' agreement."[9] *See id.*

Third, the parties have consistently treated each signatory State as retaining regulatory jurisdiction over water within its borders. The signatories to the Compact have adjudicated (or are in the process of adjudicating) water rights, granted well permits, developed groundwater resources, and administered diversions and priorities within their respective boundaries,

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Therefore, the Report should not be read as finding that any appropriator in the Lower Rio Grande with the right to divert groundwater under New Mexico law necessarily must obtain a permit from or contract with Reclamation. *See* Report at 232. This would be a novel theory of law that, if adopted, would radically change the administration of water in the Western States. Again, this case should be recommitted to the Special Master for full factual and legal development and to avoid unintended rulings with such far-reaching consequences as this.

[9] The Report also fails to identify any other interstate compacts that completely deprive a signatory of jurisdiction over water within its own borders, particularly in such an oblique manner, nor is New Mexico aware of any such compacts.

including within the Project area in Texas and New Mexico. Reclamation has also participated in state adjudications of its water rights in both Texas and New Mexico. The parties have never treated the Compact as requiring New Mexico or Texas to cede regulatory jurisdiction over Rio Grande water in the Project area.

Indeed, following the Report's reasoning to its logical conclusion would lead to the result that the Compact deprives Texas of jurisdiction over Project water in Texas, but none of the parties has ever treated Texas as lacking jurisdiction over its water resources. Texas may not have a Compact delivery requirement, but water apportioned to Texas is still "committed by compact to the Rio Grande Project." *See* Report at 213. According to the Special Master, "the 1938 Compact sufficiently dictates the method of its administration: the delivery of Texas's apportionment and lower New Mexico's apportionment must be made via Reclamation's administration of the Rio Grande Project." *Id.* at 216-17. If this conclusion would prohibit New Mexico from administering its water resources, then Texas also "is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point to be controlled and delivered to its destinations by Reclamation." *Id.* at 217. Yet, Texas has continually administered its water resources in the Rio Grande above Fort Quitman. Neither the United States nor any Compact signatories have alleged Texas is without jurisdiction to do so.

As the Court did in *Tarrant*, the Special Master should have respected New Mexico's sovereignty over its water resources within its borders. Instead, the Report stretched Compact terms far beyond their intended and ordinary meanings and has impermissibly "read absent terms into an interstate compact."[10] *Alabama v. North Carolina*, 560 U.S. at 352.

II. THE SPECIAL MASTER'S COMPACT INTERPRETATION VIOLATES NEW MEXICO'S SOVEREIGNTY BY DISCOUNTING RECLAMATION LAW'S DEFERENCE TO STATE AUTHORITY OVER WATER IN SECTION 8 OF THE RECLAMATION ACT AND THE McCARRAN AMENDMENT.

Because the Special Master believes "New Mexico . . . relinquish[es] control and dominion over the water it deposits in Elephant Butte Reservoir," Report at 197, he also interprets the Compact as mandating that Rio Grande water below Elephant Butte and still within New Mexico's borders "is not subject to appropriation or distribution under New Mexico state law." *Id.* at 211.

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[10] The Special Master misinterprets several other Compact articles in addition to Article IV. For example, he mistakenly asserts that Article VII protects the signatories' access to floodwaters below Elephant Butte, despite the lack of any language to this effect in Article VII or elsewhere. Report at 199-200. The Special Master also wrongly describes Article VIII, Report at 200-201, because Colorado and New Mexico are only required to make upstream releases of stored water to the extent of the accrued debit during a particular time to attempt to raise Usable Water levels, not to ensure a certain Project release.

The Special Master concludes, "New Mexico state law does not govern the distribution of the water apportioned by Compact." *Id.* at 216. Rather, "New Mexico . . . relinquished its own rights to the water it delivers in Elephant Butte Reservoir." *Id.*

This conclusion violates the substantial body of law governing the administration of federal reclamation projects, particularly the deference to state water law required by Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 ("Section 8") and the McCarran Amendment, 43 U.S.C. § 666 ("McCarran Amendment"). New Mexico respectfully requests that the Court disavow this conclusion and recommit this case to the Special Master for a complete evaluation of the Compact and Project's interconnection.

A. State law controls the appropriation of water for and distribution of water from federal reclamation projects pursuant to Section 8 of the Reclamation Act of 1902.

This Court has recognized that where a compact is silent regarding a subject where the law is settled, that silence indicates the parties had "no intent to modify" this settled law. *New Jersey v. New York*, 523 U.S. at 784 n.6. Here, the Reclamation Act of 1902 clearly mandates that state law controls both appropriation and distribution of water from federal reclamation projects. 43 U.S.C. § 383. This principle was well known at the time the Compact was drafted. Given the Compact's silence regarding control of Rio

Grande water delivered to Elephant Butte, this clear principle "speaks in the silence of the Compact." *New Jersey v. New York*, 523 U.S. at 784. The Special Master's conclusion that New Mexico "state law does not govern the distribution of the water apportioned by Compact," Report at 216, as well as his finding that administration by the New Mexico State Engineer is inappropriate given the interstate nature of the Project, Report at 236, ignore Section 8 and the effect it should be given in the face of the Compact's silence.

Section 8 provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. This Court examined the history of Section 8 in some detail in *California v. United States*, 438 U.S. 645 (1978). *California v. United States* involved a dispute regarding whether California's State Water Resources Control Board could impose conditions upon a permit it granted the United States to

divert and impound water for Reclamation's Central Valley Project. *Id.* at 647. The United States disputed that California had the authority to impose these conditions and sought a declaration that it could impound whatever unappropriated water it wished without complying with state law. *Id.*

To resolve this dispute, the Court thoroughly examined the development of water law in the Western United States. It noted that its prior decisions had recognized the authority of each state to prescribe its own system for allocating and administering water rights. *Id.* at 655 (citing *Kansas v. Colorado*, 206 U.S. 46, 95 (1907)). It also observed that federal legislation leading up to the passage of the Reclamation Act had consistently deferred to local water rights. *Id.* at 656-63 (citing the Mining Act of 1866 § 9, ch. 262, 14 Stat. 251, 253 and the Desert Land Act of 1877, Ch. 10, 19 Stat. 377).

Examining this context, as well as the legislative history of the Reclamation Act, the Court concluded, "[I]t is clear that state law was expected to control in two important respects." *Id.* at 665. First, "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* Second, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." *Id.* at 667. As explained by Senator Clark of Wyoming, one of the bill's sponsors:

> Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer. . . .

Id. (quoting 35 Cong. Rec. 2222 (1902)). Were the situation otherwise, the Court explained, "[d]ifferent water rights in the same State would be governed by different laws and would frequently conflict." *Id.* at 667-68. "A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal law and state water law reigned side by side in the same locality." *Id.* at 668-69.

The Court concluded, "Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights." *Id.* at 674. "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675. For these reasons, California could impose conditions upon the United States' appropriation of water for the Central Valley Project, so long as those conditions were not inconsistent with clear congressional directives applicable to that project or to reclamation projects in

general. *Id.* at 679; *see also Nevada v. United States*, 463 U.S. 110, 122 (1983); *Nebraska v. Wyoming*, 325 U.S. at 613-14.

It necessarily follows from the Special Master's conclusion that the Compact incorporated the Project, Report at 195, that authorities governing the Project, including Section 8's deference to state law, were also incorporated into the Compact. This is explicit in the original agreement between the Project water users' associations and Reclamation, which recognized that the rights of the Project water users "are to be defined, determined and enjoyed in accordance with" reclamation law and other federal law related to "the rights to use water; *and also by the laws of New Mexico and Texas*, where not inconsistent therewith." *See* Report at 108 (emphasis added). It follows that New Mexico retains its sovereign authority to ensure Reclamation's compliance with state water law.

Reclamation's actions confirm this understanding. Pursuant to Section 8, Reclamation submitted filings with the Territorial Engineer of New Mexico to appropriate water rights for the Project in 1906 and 1908. Reclamation then operated the Project without incident for more than twenty years before the Compact's adoption. After the Compact's adoption, Reclamation's operation of the Project did not change. And though Reclamation initially resisted adjudicating its water rights for the Project in New Mexico state court, it has since participated in the LRG Adjudication, and willingly participated in the Texas adjudication of Project water rights.

The Special Master's conclusion that New Mexico's "appropriation or distribution," Report at 211, is not applicable to water delivered to Elephant Butte because that water is committed to the Project by the Compact conflicts with his acknowledgement elsewhere in the Report that reclamation law governs the Project, Report at 230-31, and also disregards the long history of the parties' course of conduct. The Special Master's finding that "New Mexico state law does not govern the distribution of the water apportioned by Compact," Report at 216, also directly contravenes Section 8's directive that the United States "comply with state law in the control, appropriation, use, or distribution of water." *California v. United States*, 438 U.S. at 675 (quotation omitted). The Special Master appears to view the Project as independent of state jurisdiction, but as the foregoing shows, the Project always has been subject to state water law and administration.

B. The McCarran Amendment expresses a clear federal policy favoring state adjudication and administration of Project water.

The deference to state law and administration mandated by Section 8 is bolstered by the McCarran Amendment, which waives the United States' sovereign immunity to allow it to be joined to state water adjudications and to allow for state administration of its water rights. Although not enacted until 1952,[11]

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[11] *See* ch. 651, 66 Stat. 560 (1952).

the McCarran Amendment reinforces the conclusion that adjudication of the Project water right must occur in the pending state water adjudication. The Court has recognized that the McCarran Amendment expresses a strong federal policy in favor of state water rights adjudications. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) ("*Colorado River*"). In keeping with this policy, this Court has repeatedly denied attempts by the United States to adjudicate its water rights in federal court.

In *Colorado River*, the Court held that suits brought by the United States to adjudicate water rights for Indian tribes should also be heard in state court pursuant to the McCarran Amendment. *Id.* at 820. The Court observed that "[t]he consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights." *Id.* at 819. The Court found this "clear federal policy," *id.*, so important that it announced a new form of abstention counseling federal courts to avoid hearing cases for reasons of "wise judicial administration," rather than allow the case to proceed in federal court, *id.* at 817-21; *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. District Court in and for Eagle Cnty., Colo.*, 401 U.S. 520 (1971).

The McCarran Amendment also gives state administrators authority to "execute [a decree], to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968). *Id.*

This allows each state to "administer its own water law system as efficiently and completely as possible." *Fed. Youth Ctr. v. Dist. Ct. in and for Jefferson Cnty.*, 575 P.2d 395, 399 (Colo. 1978). In short, the intent of the McCarran Amendment is to "ensure that the United States would be subject to suits seeking initial declaration or adjudication of water rights, as well as to subsequent proceedings further affecting or disposing of those rights." *Id.*

The Special Master ignores the McCarran Amendment and this precedent, concluding, "New Mexico state law does not govern the distribution of the water apportioned by Compact." Report at 216. From this conclusion, and the fact that the Compact contains no terms governing distribution of this water, he finds that routine administrative questions such as "times of delivery and source of supply" must be determined by "[e]quitable apportionment, a federal doctrine." *Id.* Questions regarding such matters, according to the Special Master, "must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court." *Id.* This strongly suggests that the Special Master believes the United States' water right for the Project should be adjudicated in this proceeding. However, the McCarran Amendment confirms New Mexico's authority to adjudicate water rights in the Lower Rio Grande, including for the Project, and its ability to administer those rights to ensure they comply with state law.

New Mexico and the United States have already invested substantial resources into adjudicating the Project right. And New Mexico's authority over the

Project right has been upheld in two separate decisions. *City of Las Cruces*, 289 F.3d at 1170; *Regents*, 849 P.2d at 372. Because the Project water right originates from New Mexico state law, it is appropriate for that right to be adjudicated and administered under New Mexico state law. The Project right can be properly adjudicated only in relation to all of the other holders of water rights in the Lower Rio Grande within the State of New Mexico. Application of fundamental principles of state water law must be consistent for all water users, and this is best accomplished by New Mexico under its sovereign authority over waters within its borders.

The Special Master further suggests administration by New Mexico "works best only to resolve intrastate water disputes," Report at 235, whereas the present dispute implicates "other sovereigns" with "significant interests in the resolution" of these claims. *Id.* at 236. Yet, the McCarran Amendment contains no interstate exceptions to its waiver of sovereign immunity for administration of federal water rights. Adopting the Special Master's view will not only prevent New Mexico from "administer[ing] its own water law system as efficiently and completely as possible," *Fed. Youth Ctr.*, 575 P.2d at 399, it will also make it impossible for New Mexico to comply with any decree this Court might enter to resolve this dispute. If New Mexico is found to have allowed any diversions that violate the Compact, its method of complying with this finding will be for the State Engineer to curtail diversions of water within New Mexico that interfere with the

Project's water rights – the same remedy the Special Master concludes is inappropriate. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938); N.M.S.A. § 72-2-9.1.

C. Pursuant to Section 8 and the McCarran Amendment, New Mexico law defines and protects the Project's water right.

The LRG Adjudication court recently confirmed the United States' priority date for its Project water right is March 1, 1903, based on surveys and other acts the United States undertook to initiate the appropriation at that time. Findings of Fact and Conclusions of Law, LRG Adjudication (Apr. 17, 2017). The LRG Adjudication court also found the United States appropriated surface water rights for the Project, not groundwater rights. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, LRG Adjudication (Aug. 16, 2012). Specifically, the LRG Adjudication court held that all points of diversion asserted and established by the United States, including Elephant Butte, Caballo Reservoir, and the downstream diversions, "capture and divert surface water." *Id.* at 5. Further, the court found the Notices of Intent to Appropriate the United States filed in 1906 and 1908 established a surface water right. *Id.* at 5-6.

"The points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to surface water under New Mexico law. . . . " *Id.* at 6. However, there is "no dispute that an interactive relationship between groundwater and surface water exists within . . . the Rio Grande reach downstream of Elephant Butte Dam" and "that reuse of Project water is an inherent component of the Project operation." *Id.* at 4, 6.

To be clear, New Mexico has never contended groundwater users in southern New Mexico may simply pump their wells without regard to the effects this may have on the Rio Grande or the Project, as the Special Master appears to have interpreted New Mexico's argument in its Motion to Dismiss. On the contrary, New Mexico law recognizes the authority of the New Mexico State Engineer to conjunctively manage hydrologically related ground and surface water and to regulate and curtail groundwater withdrawals in amount, time and location that are negatively impacting the use of senior surface water rights, and vice versa. *City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962).

This principle was applied to the Project in *City of El Paso v. Reynolds*, where the federal district court noted that, although Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply," this did not preclude the New Mexico State Engineer from "conjunctively manag[ing] the surface and ground

water in the Lower Rio Grande system." 563 F. Supp. at 387.

In sum, New Mexico law does not allow New Mexico or its citizens to injure the Project right, but instead protects the Project's water rights from any such pumping or diversion interference. The LRG Adjudication court has determined all significant aspects of the Project water right. The Special Master's Report identifies no instance in which New Mexico law is inconsistent with the Project allocation, which the Special Master concludes is incorporated into the Compact. The United States acquired its Project water rights under New Mexico law, which continues to govern the administration of both groundwater and surface water below Elephant Butte, consistent with the Compact.

III. THE LAW OF EQUITABLE APPORTIONMENT DOES NOT DEPRIVE NEW MEXICO OF JURISDICTION OVER WATER APPORTIONED BY COMPACT.

The Compact Preamble states it "effect[s] an equitable apportionment of" the waters of the Rio Grande above Fort Quitman, Texas. The Special Master appears to view this apportionment as precluding application of New Mexico law to Rio Grande water below Elephant Butte. This interpretation rests on a flawed reading of *Hinderlider*, 304 U.S. at 102, which holds that a state cannot confer rights to water in an interstate stream in excess of the state's own compact rights, and the Colorado Supreme Court's analysis of a

compact's effect on state law and administration in *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983) ("*Alamosa-La Jara*"). Because the Special Master interprets New Mexico's delivery obligation as depriving it of ownership and control over Rio Grande water once delivered to Elephant Butte, Report at 213, he concludes that "'state law applies only to the water which has not been committed to other states by the equitable apportionment.'"[12] Report at 216 (quoting *Alamosa-La Jara*, 674 P.2d at 922). Contrary to the Special Master's conclusion, but consistent with the holdings of *Hinderlider* and *Alamosa-La Jara*, state engineers in western states routinely administer water rights to comply with both state law and compact obligations. The New Mexico State Engineer has the authority to do the same here for water in the Lower Rio Grande.

Hinderlider addressed a dispute between a company, which owned a right acquired under Colorado law to withdraw water from the La Plata River, and the Colorado State Engineer ("Engineer"), the official charged with administering water rights within that State. 304 U.S. at 97. The plaintiff company's Colorado water right was awarded by court decree prior to adoption of an interstate compact apportioning the waters of the La Plata River. *Id.* at 98. In 1928, a shortage of

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[12] Water rights exist in the Rio Grande south of Elephant Butte in New Mexico with claimed priority dates that pre-date the Project, and groundwater rights that are not tributary to the Rio Grande.

water led the Engineer to curtail the company's diversions to allow water to flow into New Mexico, as required by the La Plata River Compact, even though the company's decree would otherwise have permitted it to continue diverting water. *Id.* at 97-98. The company argued the Engineer violated the terms of its water right decree and that the La Plata River Compact impaired vested property rights preexisting its adoption. *Id.* at 99.

This Court disagreed. It held the company's water right was "indefeasible so far as concerns the State of Colorado," but Colorado could not "confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream, and its share was only an equitable portion thereof." *Id.* at 102. The Court held that apportionments are "binding upon the citizens of each State and all water claimants, even where the State had granted water rights before it entered into the compact." *Id.* at 106. "[T]he private rights of grantees of a State are determined by the adjustment by compact" because, when apportioning the water of an interstate stream, each state acts "as a quasi-sovereign and representative of the interests and rights of her people." *Id.* at 106-07 (quoting *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932)). Because the states had the power to "bind by compact their respective appropriators," they "had the power to reach that end," that is, to enforce the apportionment. *Id.* at 108. "The delegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional

power" to apportion the stream. *Id.* Because Colorado possessed only an equitable share of the stream even prior to the compact's adoption, the compact did not deprive the company of any vested interest. *Id.*

Hinderlider did not discuss whether the La Plata River Compact deprived Colorado of jurisdiction over water in the La Plata River. Instead, *Hinderlider* considered whether that compact's adoption *conferred* authority on Colorado to enforce its terms. *Id.* at 108. *Hinderlider* concluded a state's authority to enforce a compact is a necessary incident to its constitutional authority to enter the compact. *Id. Hinderlider* did not hold that Colorado relinquished its jurisdiction to administer La Plata River water, even water apportioned to New Mexico. On the contrary, state administration was the means by which Colorado enforced the compact and ensured New Mexico received its share of the river's water. Colorado's method of administering its water rights may have been modified by the La Plata River Compact, but its jurisdiction to administer water within its borders was not superseded. The lesson of *Hinderlider* is that a compact controls, but only where the compact cannot be reconciled with state law. Here, there is no conflict between New Mexico law and the Compact.

The Report similarly misapplies *Alamosa-La Jara*. In that case, the Colorado Supreme Court weighed a challenge to state rules on water use in the Rio Grande Basin in Colorado. 674 P.2d at 916-17. A lower court had approved a portion of the rules requiring separate administration of the Conejos River and the Rio

Grande, even though the former is a tributary of the latter, and water users on the Conejos River appealed. *Id.* at 920-21. They maintained separate administration of the rivers was inequitable because strict enforcement of the Conejos' Compact delivery schedule resulted in the Conejos River supplying 45 percent of Colorado's Compact deliveries, even though it contained only 30 percent of Colorado's Rio Grande Basin water. *Id.* at 921. Specifically, the water users argued the Compact could not control intrastate water distribution, and that enforcing the separate schedules violated the Colorado Constitution, which requires water to be administered on the basis of priority. *Id.* at 922 (citing COLO. CONST. art. XVI, §§ 5, 6).

The Colorado Supreme Court disagreed. It found separate management of the Conejos and Rio Grande was required by the Compact and was consistent with the historical administration of both rivers under Colorado law. *Id.* Development of water rights "occurred independently on the Rio Grande mainstem and the Conejos River," and diversions on one stream had never "been subject to curtailment by senior appropriators on the other." *Id.* The court found nothing in the Compact that would "re-sort[] settled water rights on both streams into a single system of priorities based solely on the dates of appropriation." *Id.*

The court explained that where compacts are "deficient in provision for intrastate administration," Colorado law requires they be implemented to "restore lawful use conditions as they were before the effective date of the compact insofar as possible." *Id.* (quoting

C.R.S. § 37-80-104). Accordingly, "a compact obligation should not be viewed as a senior water right which upsets historical development and reshuffles rights according to a chronological formula." *Id.*

In addition, the plain language of the Compact required separate administration because the separate delivery schedules were clear on their face. *Id.* at 925. Therefore, the Colorado State Engineer had authority to administer the Rio Grande within Colorado in a manner consistent with the Compact's express terms and could "use his water rule power to address the supply problems in the Conejos Basin." *Id.*

As relevant here, *Hinderlider* and *Alamosa-La Jara* stand for two clear principles: first, states must administer water rights within their boundaries to ensure compliance with an interstate compact, even when this administration varies from what state law would require absent the compact. *See Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 922-23. Second, even where an interstate stream has been equitably apportioned, states retain the authority to administer its waters within their borders, both to ensure compliance with the apportionment and to enforce state law and state appropriations where this does not directly conflict with the terms of the apportionment. *Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 925.

The Special Master focuses solely on the first principle, that state administration can be modified by an apportionment, and ignores the second, that state

administration is not only permissible but also necessary to ensure compact compliance. In doing so, his recommendation that the Compact's equitable apportionment of the Rio Grande deprives New Mexico of jurisdiction over water in the Rio Grande below Elephant Butte, Report at 211, is at odds with both cases. *Hinderlider* did not hold that ratification of the La Plata River Compact deprived Colorado of jurisdiction over water in the La Plata River that was apportioned to New Mexico, nor did *Alamosa-La Jara* hold that the Colorado State Engineer was similarly powerless to administer Rio Grande waters in Colorado. On the contrary, the question in both cases was the scope of the Colorado State Engineer's authority to enforce a compact, and both cases held that the Colorado State Engineer, and by extension, Colorado, have that authority. *Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 925.

Hinderlider and *Alamosa-La Jara* amply demonstrate that states have the authority and flexibility to administer waters that have been apportioned by compact in accordance with state laws and policies, so long as they also comply with the terms of the relevant compact. The Special Master's conclusion that New Mexico relinquished jurisdiction over the waters below Elephant Butte contravenes these cases. Therefore, the Court should expressly disavow this conclusion and the reasoning supporting it.

IV. THE SPECIAL MASTER'S USE OF UNTESTED EXTRINSIC EVIDENCE WAS IMPROPER IN THE CONTEXT OF A MOTION TO DISMISS AND DEPRIVED THE PARTIES OF THE ABILITY TO REVIEW, VERIFY, OBJECT TO, OR PRESENT COUNTERVAILING EVIDENCE.

Despite concluding the text and structure of the Compact unambiguously protect the Project and that "no need exists to rely upon the history of the 1938 Compact to interpret that language," Report at 203, the Report contains an extensive analysis of not only the historical background of the Project and Compact, but also the general history of the Rio Grande Basin above Fort Quitman. *Id.* at 31-187. This lengthy discussion far exceeds what is necessary or advisable at this early stage of the litigation. In the context of this discussion, the Report cites many extrinsic sources that were not submitted by any party to this case, and that are contravened by other, thus far unproffered, sources.

The Special Master states that this extensive historical discussion is merely to "give the Compact context" and insists that it should not be "construed as fact finding violative of Fed. R. Civ. P. 12," because nothing in the historical record was dispositive concerning the Report's ultimate recommendations. *Id.* at 193. This acknowledges that the historical discussion in the Report was unnecessary to the Report's recommendations. It could, however, do harm in other respects. Despite the Special Master's disclaimer, this extensive discussion still could be construed as making findings

of fact or, at the very least, as lending an official imprimatur to a specific version of events before the scope of this litigation is known and before the parties have fully vetted the sources cited or the conclusions drawn from those sources. Through errors of both omission and inclusion, the Special Master's historical discussion offers a narrative that is likely to prejudice future proceedings in this case. The Special Master's discussion of his selected material risks establishing facts and lending credence to theories that could prematurely direct the course of this litigation without providing the parties an opportunity to properly introduce evidence, contest its authenticity and contents, qualify experts and present their opinions, and rebut evidence with other relevant evidence.

In short, the Special Master should not rely on or even put forth extrinsic evidence unilaterally compiled. Accordingly, New Mexico requests that the Court reject the Special Master's current historical discussion (found at pages 31-187 of the Report) in its entirety and return the case to the Special Master for full development of the record.

The Special Master repeatedly refers to language in *Arizona v. California*, 373 U.S. 546, 552 (1963), which states that the "meaning and scope" of a compact "can be better understood when the [compact] is set against its background." *See* Report at 8, 32, 193. This language does not justify the extensive analysis and *sua sponte* research done by the Special Master in this case. To be sure, this Court has held that it can be

"appropriate to look to extrinsic evidence of the negotiation history" of the compact in question in order to interpret *ambiguous* terms. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). In this case, by contrast, the Special Master has explicitly stated his belief that the Compact is *not* ambiguous for purposes of evaluating the Motion to Dismiss, Report at 203, thereby rendering development of the negotiation and legislative history improper.

Moreover, the historical document discussion in *Arizona v. California* was based on information generated and tested through nearly a decade of litigation among the parties. *See* 373 U.S. at 551. Original jurisdiction cases do not undergo the levels of review required for cases taken by the Court under *certiorari* jurisdiction, so it is essential to enable development of a full record prior to making findings of fact. *See, e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950) (the Court, "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.") (citing cases).

Even when resorting to the historical record is proper, the Court has imposed limits on what sorts of legislative history a court should consider when interpreting a federal statute, including a compact. The Court has suggested that, when interpreting a federal statute, courts should limit themselves to legislative history of more certain reliability, such as official Committee Reports on a bill, and "eschew[]" questionable sources such as "the passing comments of one Member"

or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984). In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court held that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." 545 U.S. 546, 568 (2005). Similarly, *Arizona v. California* denied the introduction of statements made by individuals negotiating the Colorado River Compact in 1922 because it was not proper to consider "oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." 292 U.S. at 360.

The Report's extensive *sua sponte* research, discussion of, and citation to historical materials not submitted by the parties also stands in stark contrast to the more limited use of extrinsic historical materials in other recent original actions. Special masters in other cases have been careful to limit their review of legislative history to "primary sources *placed in the record by the parties or their experts during trial* or . . . congressional or state documents of accepted probative value." Report by Special Master Paul R. Verkuil at 31-32, *State of New Jersey v. State of New York*, No. 120, Original (Mar. 31, 1997) (emphasis added).

In keeping with this principle, the First Report of the Special Master in *Kansas v. Nebraska*, No. 126, Original, on Nebraska's motion to dismiss, contains

an abbreviated twelve-page discussion of the Republican River Compact's background. First Report of the Special Master at 6-18, *Kansas v. Nebraska*, No. 126, Original (Jan. 28, 2000). The special master in that case reiterated that indications of the parties' intent should only be taken into account in the event that the language of the Compact is ambiguous, and even then extrinsic sources should be limited to reliable public records such as minutes of Compact negotiations and records of subsequent Compact administration. *Id.* at 19. Therefore, while that report cites to a small number of extrinsic sources, they are limited to official reports from federal agencies, letters to and from compact commissioners, and reports and minutes of the Republican River Compact Commission. *Id.* at i, v-vii.

Similarly, while the First Interim Report of the Special Master in *Montana v. Wyoming* on Wyoming's motion to dismiss contains a discussion of the historical background of the Yellowstone River Compact, it is also comparatively brief at a mere ten pages. *See* First Interim Report of the Special Master at i, *Montana v. Wyoming*, No. 137, Original (Feb. 20, 2010). Although that report cites to and discusses some extrinsic sources, these are limited to prior drafts of the Yellowstone River Compact, official minutes of the Yellowstone River Compact Commission, a handful of letters from compact commissioners, official reports of federal agencies, and House and Senate reports. *Id.* at x-xi. Not only are these citations limited to those primary sources of the type deemed to be especially reliable, but

they are also taken from a Joint Appendix compiled by the parties. *See id.* at 3.[13]

The Special Master provides no explanation of the methodology he used to gather and evaluate the historical materials discussed in the Report, and much of the research appears to have been conducted *sua sponte*, with little or no input from the parties. In the absence of any explanation of how this research was conducted and why certain materials are discussed in the Report while others were excluded, or perhaps not reviewed at all, it is impossible for the parties to evaluate whether the Report reflects a balanced evaluation of the historical record or an incomplete and perhaps one-sided account of these events.

Furthermore, the Report relies upon a number of documents that are not primary sources and are inappropriate to consider in this context. For example, the Report cites numerous times to an article written by Raymond Hill, the engineering advisor for Texas during Compact negotiations, which was published 36 years after the Compact's negotiation and adoption. *E.g.*, Report at 151 (citing Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163 (1974) ("Hill Article")).[14]

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[13] If the historical documents cited in the Report or any other extrinsic sources are pertinent to the questions raised in this case, the parties will certainly submit these materials in the normal course of the litigation. They will then be subject to the normal evidentiary requirements of authentication, relevance, and reliability. *E.g.*, Fed. R. Evid. 401, 901.

[14] The Table of Authorities, Report at xlvii, lists only one citation to Mr. Hill's article, at page 151, but the Report cites this

Although Mr. Hill was involved in the negotiation of the Compact, the Hill Article was written and published well after the Compact's adoption and cannot be considered a contemporary account. There is no indication whether Mr. Hill's recollection of events many decades later is inaccurate or biased, but the Special Master repeatedly relies on the Hill Article not only for information on events that occurred during the negotiations, but also to explain the meaning of Compact terms. *E.g.*, *id.* at 199-200 & n.53. Sources such as the Hill Article do not "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.*, 545 U.S. at 568. Their use in the Report as an aid to interpreting purportedly unambiguous Compact terms is inappropriate without further vetting.

The Report's discussion of the Compact's history and context, and particularly its reliance on numerous extrinsic sources, is premature. It has the potential to establish facts and precedent in these proceedings before discovery has occurred. In light of these issues, New Mexico respectfully requests that the Court reject the Report's historical discussion, explicitly confirm that the Special Master's reliance on historical documents establishes no factual findings or precedent in these proceedings, and return the case to the Special Master for full development of the historical record.

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article a dozen times, including a three-page block quotation on pages 184-87. These citations appear on pages 147 n.41, 151, 157, 161, 163-64, 166 n.44, 168, 169, 170, 184-87, 194 n.50, and 200 n.53.

V. THE UNITED STATES SHOULD BE PRECLUDED FROM RELITIGATING ITS WATER RIGHT FOR THE PROJECT.

The Report recognizes the United States has no right of action under the Compact and cannot state a claim implicating this Court's exclusive original jurisdiction under 28 U.S.C. § 1251(a)(1) in this matter. Report at 231.[15] The Report recommends, however, that the Court exercise its nonexclusive original jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) so that all claims related to the allegations New Mexico has tolerated improper surface and groundwater diversions in the LRG may be resolved in a single proceeding. *Id.* at 234.

New Mexico does not except to this recommendation. However, if the Court agrees to extend its original jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claims, it should strictly limit the United States' participation in this case and preclude the United States from attempting to use this forum to relitigate settled issues regarding the nature and scope of its Project right.

Congress has clearly directed that the United States acquire water rights for its reclamation projects

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[15] Regardless of whether the United States' claims are properly construed to arise under the Compact or not, New Mexico maintains that the United States' participation is indispensable to resolution of this dispute, and accepts the Special Master's recommendation that the Court extend its jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claim that New Mexico has interfered with its ability to deliver Project water.

pursuant to state law and participate in state court adjudications of these rights. Both state and federal courts have ruled that the United States must adjudicate its Project rights in state court. *City of Las Cruces*, 289 F.3d at 1170; *Regents*, 849 P.2d at 372.

Section 8 of the Reclamation Act and the McCarran Amendment require the United States to adjudicate its water rights in state court. The LRG Adjudication court has issued final orders determining the amount, source of supply, and priority date for the United States' water right for the Project. Orders filed August 16, 2012; February 17, 2014; April 17, 2017. If the United States disagrees with any aspect of these orders, it is free to appeal them. *See Colorado River*, 424 U.S. at 816.

New Mexico requests that the Court decline to extend its nonexclusive original jurisdiction to allow the United States to relitigate questions regarding the scope of its Project water right. The Court should limit the United States' participation in this case to resolving the narrow questions posed by its Complaint in Intervention related to reclamation law claims.

CONCLUSION

The Court should enter an order denying the Motion to Dismiss Texas's Complaint, granting the Motion to Dismiss the United States' Complaint to the extent it raises Compact claims but extending its jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United

States' claims, denying the Motions to Intervene, and recommitting the case to the Special Master. In doing so, it should state affirmatively that any findings or conclusions specified in the Report are not the law of the case. The Court should refrain from adopting the Report, and should reserve judgment on all issues that need not, and should not, be determined at this preliminary stage of the litigation. It is imperative for the fairness of these proceedings that the Court have the benefit of a fully developed record before it decides critical issues of compact interpretation and state sovereignty.

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In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in support of the State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support dated June 9, 2017 ("New Mexico's Brief on Exceptions to the First Interim Report"), pursuant to Sup. Ct. R. 37.4.[1] The City brings to the Court's attention issues not raised

[1] The City of Las Cruces is an incorporated New Mexico municipality. While the City can file an *amicus* brief as of right pursuant to Sup. Ct. R. 37.4 as a "city, county, town, or similar entity," it nonetheless provided notice to all parties of its intent to file an *amicus curiae* brief.

in New Mexico's Brief on Exceptions to the First Interim Report.[2]

INTEREST OF *AMICUS CURIAE*

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s, the first settlers having arrived in 1839, led by Don Jose Costales. *See Regional Planning Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-37* at 72 (1938). The emerging community received its first water supply from the Acequia Madre de Las Cruces around 1849. Las Cruces transitioned to groundwater wells more than a century ago. Today the City is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the western United States and its population is expected to exceed 150,000 by 2050. The City's water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin. Pursuant to state law, Las Cruces is entitled to have a forty-year water supply. *See* NMSA 1978, § 72-1-9 (1985).

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[2] The City supports the Special Master's recommended denial of Elephant Butte Irrigation District's Motion to Intervene and El Paso County Water Improvement District No. 1's Motion to Intervene. *See* First Interim Report at 237-77.

Texas' Complaint alleges that the 1938 Rio Grande Compact was premised on the "understanding" that Texas bargained for a "1938 condition" of the Rio Grande that incorporated the Rio Grande Project. In Texas' view, this renders post-1938 depletions of the river Compact violations. The underlying premise of the United States' Complaint in Intervention is that groundwater in storage in the Lower Rio Grande is "Project Supply" for the Rio Grande Project, not public water of the State, thereby obligating water users in New Mexico to obtain federal contracts despite decades of exercising state-based water rights under state permits and Declarations. In recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master adopts Texas' theory that the Compact required state line deliveries under a "1938 condition." Moreover, although he recommended granting New Mexico's Motion to Dismiss the United States' Complaint in Intervention, he nonetheless recommended that the United States remain a party to pursue federal Reclamation law claims pursuant to the Court's discretionary, non-exclusive original jurisdiction pursuant to 28 U.S.C. § 1251(b)(2).

There are significant adverse consequences to Las Cruces from the Special Master's recommendations in the First Interim Report. In short, he recommends a *de facto* apportionment of the Lower Rio Grande that: 1) requires specific state line deliveries that ignore Las Cruces' historical and present water use and locks Las Cruces and New Mexico into 1938 water use conditions; 2) divests New Mexico of jurisdiction over

surface water and groundwater in the Lower Rio Grande; 3) places Las Cruces' state-based groundwater rights in jeopardy by requiring the City to obtain water supply contracts from the United States decades after its state-based rights were perfected by application to beneficial use; and 4) creates confusion as to the status of the general stream system adjudication styled *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996), where the City's and the United States' rights are being determined.[3]

BACKGROUND

1. Rio Grande Compact.

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). Colorado is obligated to deliver a percentage of the recorded inflow at the Colorado-New

[3] If the recommendations in the First Interim Report are adopted, a 1938 condition would also apply in Texas above Ft. Quitman as well as in New Mexico; the United States would also administer all surface water and groundwater in Texas above Ft. Quitman; groundwater users above Ft. Quitman, including the City of El Paso, would have to obtain water supply contracts from the United States; and any Texas-based water rights set forth in its adjudication would be at risk of being null and void.

Mexico state line under Article III of the Rio Grande Compact. This delivery obligation is measured by a gaging station at Lobatos, Colorado, near the state line.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gaging station at Otowi, New Mexico. The Resolution adopted at the Compact Commission meeting on February 14-16, 1949, changed New Mexico's point of delivery from San Marcial to Elephant Butte Reservoir, and revised the measurement of deliveries in Article IV.

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande extends from the Colorado-New Mexico state line to Otowi Gage. The Middle Rio Grande is situated between the Otowi Gage and Elephant Butte Reservoir, and the Lower Rio Grande stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line.

Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply for a growing city.

2. The Rio Grande Project.

Pursuant to the Reclamation Act, the United States initiated the acquisition of surface water rights for the Rio Grande Project by filing Notices of Intent to Appropriate with the New Mexico Territorial Engineer in 1906 and 1908. *See* Reclamation Act of 1902, §§ 2 and 8, 32 Stat. 388; *see also* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. The Notices of Intent sought to reserve then-unappropriated surface waters upstream of Elephant Butte Reservoir for storage in Elephant Butte Reservoir for use in the Rio Grande Project. New Mexico's delivery obligation into Elephant Butte Reservoir is governed by Article IV of the Rio Grande Compact.

Once released from Elephant Butte Reservoir, Project surface water is allocated between Elephant Butte Irrigation District ("EBID"), located in New Mexico, and El Paso County Water Improvement District No. 1 ("EP No. 1"), located in Texas. Ever since the Rio Grande Compact has been entered, Rio Grande Project water released from Elephant Butte Reservoir has been governed and administered by a combination of contracts and state and federal law.

3. Lower Rio Grande Adjudication.

A general stream system adjudication in New Mexico is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907). An

adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> . . . as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The Lower Rio Grande Adjudication ("LRG Adjudication") was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996). The LRG Adjudication includes many claimants of surface water and groundwater rights between Elephant Butte Reservoir and the New Mexico-Texas state line, including all constituents of EBID that use surface water. All claimants to water rights within a stream system must be joined to ensure due process.

Las Cruces has a two-fold interest in the LRG Adjudication. First, the City seeks judicial recognition of its water rights to supply its municipal needs. Second, Las Cruces must be prepared to challenge *inter se* other defendants' water right claims that may infringe on the City's water use. The City's interest is only served if all water rights claimants (indispensable parties) are present and joined to a decree for post-adjudication administration.

Despite its opposition, the United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372; *United States v. City of Las Cruces et al.*, 289 F.3d 1170 (10th Cir. 2002). The judicial determination of the United States' Rio Grande Project rights is now complete. The LRG Adjudication Court has quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.[4] The Court determined the Rio Grande Project priority date following a two-week trial in September of 2015 and briefing and oral argument in September of 2016.

Importantly, the LRG Adjudication Court has also held that groundwater is not part of Rio Grande Project water supply.[5] The Court correctly recognized that

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[4] *See* Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (3d Jud. Dist.) filed Feb. 17, 2014.

[5] The LRG Adjudication Court held that "New Mexico law . . . controls the determination of the source or sources of water for the Project." *See* Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist.) filed Aug. 16, 2012 at 4. It found that "[t]he points of diversion constructed by the United States

the Project water supply originates upstream of Elephant Butte Reservoir based upon the United States obtaining its water rights under state law as set forth in the Reclamation Act of 1902. Combined with that holding, the LRG Adjudication Court also found that return flows and seepage are necessary to meet Project deliveries downstream of Elephant Butte Reservoir. The Court stated:

> The Project relies upon reuse of water in order to execute the Project's purposes of storing, releasing, and delivering the waters of the Rio Grande for irrigation in New Mexico and Texas and fulfill the United States' treaty obligation to Mexico. In this regard, it is a typical reclamation project. The parties do not appear to dispute that reuse of Project water is an inherent component of the Project operation, as the Project delivers an annual average of 930,000 acre-feet from an annual release of roughly 790,000 of water stored in Project reservoirs.
>
> *Ide* explains that seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water:

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and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to *surface water* under New Mexico law. . . ." *Id.* at 6 (emphasis added).

> Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters.

263 U.S. at 506 (*quoting United States v. Haga*, 276 Fed. 41, 43 (1921)). The reclamation project water at issue in *Ide* had been applied to irrigation uses and, after migrating downstream, emerged as seepage to create surface flow that was still identifiable as project water. Under New Mexico law, "[w]hen an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under the provisions of [Section 72-12-1] and are subject to appropriation in accordance with applicable statutes." *Kelley v. Carlsbad Irr. Dist.*, 76 N.M. 466, 472, 415 P.2d 849, 853 (1966); *See also State ex rel. Reynolds v. King*, 63 N.M. 425, 428, 321 P.2d 200, 201 (1958).

> Determining whether Project water retain its identity as Project water is a condition-specific and technical inquiry. The scope of the adjudication, in contrast, is more limited, focusing on defining the elements of the right. NMSA 1978, § 72-4-19 (1907) (stating that an adjudication decree shall "declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority"). The Court leaves the determination of whether Project water retains its identification to administrative proceedings conducted before the State Engineer.

See Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist.) filed Aug. 16, 2012 at 6-7. The LRG Adjudication Court's analysis and ruling with respect to return flows and seepage is consistent with federal Reclamation project operations across the western United States.

The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus*

curiae, filing briefs and presenting oral arguments in that case.[6]

While a final adjudication decree will ultimately be utilized for administration of all interrelated surface water and groundwater rights in the Lower Rio Grande, the New Mexico Supreme Court has upheld the authority of the State Engineer to administer water rights without a final adjudication decree pursuant to Active Water Resource Management Regulations. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232.

4. First Interim Report of the Special Master.

The First Interim Report of the Special Master was issued on February 9, 2017 ("First Interim Report"). The Special Master recommended denial of New Mexico's Motion to Dismiss Texas' Complaint and the granting of New Mexico's Motion to Dismiss the United States' Complaint in Intervention. He recommended that the United States nevertheless be granted leave to participate pursuant to 28 U.S.C. § 1251(b)(2) under the Court's discretionary, non-exclusive original jurisdiction to pursue claims under federal Reclamation law, but not Compact claims. The First Interim Report adopted Texas' contention that the apportionment by the Rio Grande Compact was completed at the New Mexico-Texas state line, not 100

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[6] El Paso, supported by EP No. 1, moved twice to stay proceedings in the LRG Adjudication. Both motions were denied. The issue is now moot.

miles to the north at Elephant Butte Reservoir as expressed in Article IV of the Compact and as administered by the Rio Grande Compact Commission. The First Interim Report was prefaced by 187 pages of Compact history containing numerous extrinsic archival and secondary sources.

The State of New Mexico moved to dismiss Texas' Complaint and the United States' Complaint in Intervention on April 30, 2014. A draft report was circulated by the Special Master on July 1, 2016. More than 60 pages of comments were received, including those from the City of Las Cruces.

SUMMARY OF ARGUMENT

In recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master erred in three respects. First, he undertook independent fact finding from extrinsic evidence to reach findings and conclusions on the merits that extend far beyond a motion to dismiss. The Special Master's exhaustive research into original and secondary documents was conducted and his conclusions reached without proper participation from the parties, *viz.*, no answer, counterclaim, cross-claims, discovery, or evidence at trial. His conclusions were rendered despite the express terms of the Rio Grande Compact and Compact administration to the contrary since 1939.

Second, he failed to address precedent that Texas' claims were barred by acquiescence. *Cf. Washington v.*

Oregon, 297 U.S. 517 (1936); *Nebraska v. Wyoming*, 507 U.S. 584 (1993). Previous actions filed by Texas seeking relief relating to Rio Grande Compact interpretation and administration failed to raise the issues now raised by Texas regarding diversions below Elephant Butte Dam.

Third, with respect to the United States' Complaint in Intervention, he recommended a misapplication of 28 U.S.C. § 1251(b)(2) to keep the United States a party despite finding that the United States' Complaint does not implicate the Rio Grande Compact. The United States' claims to the Rio Grande Project have been determined in an alternative forum. This recommendation contravenes the *Colorado River* abstention doctrine and creates a conflict with the state LRG Adjudication proceedings. *See Colorado River Conservation District v. United States*, 424 U.S. 800 (1976).

Moreover, if the United States is allowed to pursue federal Reclamation claims, as recommended by the Special Master, including that parties have taken Project water without a contract, it would be a denial of due process if the affected surface and groundwater users such as Las Cruces were not a party to the litigation. If the Court accepts the Special Master's recommendation that the United States be allowed to pursue federal Reclamation claims in the Court's discretionary, non-exclusive original jurisdiction, Las Cruces and other LRG water users will have to consider intervention, because they are the real parties-in-interest against whom federal Reclamation contract claims are being asserted.

The more judicious approach is for the Court to grant New Mexico's Motion to Dismiss the United States' Complaint in Intervention.

ARGUMENT

POINT I

THE FIRST INTERIM REPORT EXCEEDS THE SCOPE OF RULE 12(b)(6) TO THE DETRIMENT OF LAS CRUCES

Under Fed. R. Civ. P. 12(b)(6): "[i]n deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice."[7] 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2017); *see, e.g.*, *Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963 (7th Cir. 2013). Typically, "once the court decides to accept 'matters outside the pleadings', the motion will be treated as one for summary judgment and disposed of as provided in Rule 56." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][a] (3d ed. 2017). The purpose of this is to ensure that "'all parties' are 'given a reasonable opportunity to present material that is pertinent,' to a Rule 56 summary judgment motion." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][b]

[7] Pursuant to Sup. Ct. Rule 17.2 for Procedure in an Original Action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." *Ibid.*

(3d ed. 2017). This provides "that the court must make sure that the parties know that the court is considering rendering a summary judgment in the matter. In addition, the court must give the parties a fair opportunity, a reasonable amount of time, to assemble summary judgment affidavits and other supporting and opposing materials and present them to the court." *Id.*; *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287-89 (3d Cir. 1999); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2d Cir. 1990).

A significant issue has been created with New Mexico's Motions to Dismiss Texas' Complaint and the United States' Complaint in Intervention because the Special Master has *sua sponte* gone extensively beyond the pleadings to resolve the motion to dismiss. The parties were not provided notice that the Special Master was going to resolve many of the issues on the merits, *viz.*, converting the motion to dismiss into a motion for summary judgment, and therefore, did not have a reasonable opportunity to respond with their own evidence given the gravity of the Special Master's recommendations on the merits of the case. The result is a confusing procedural posture of the case beyond recommending that a sufficient claim has been stated to proceed to trial.

The Special Master conducted his own exhaustive research into primary archival materials from various archives and other document repositories and secondary sources related to the Rio Grande Compact. *See* First Interim Report at 9-187. For example, the Special Master's assistant traveled to Austin, Texas, to

collect and review "archival original source documents," and spent hundreds of hours researching and analyzing primary and secondary source materials beyond what was in the parties' pleadings.[8] The topics researched by the Special Master include evidence from the Compact negotiations, Compact negotiators' intent, and Compact administration, with documents that include law review articles and other secondary sources such as Douglas R. Littlefield's treatise entitled *Conflict on the Rio Grande: Water and the Law, 1879-1939* (Univ. of Calif. Press 2008). The historical documents include materials provided by the Special Master on a DVD and other source material cited in the Table of Authorities of the First Interim Report.

The historical research and analysis set forth in the First Interim Report went significantly beyond "background" or providing "historical context" to the Rio Grande Compact. First Interim Report at 8, 193. Instead, a review of the First Interim Report reveals that the Special Master relied on and cited his own independent research as authority in reaching decisions on the merits rather than simply determining whether Texas' Complaint states a "plausible" claim upon which relief can be granted. *Id.* at 203-17. A complaint must "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544

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[8] *See* Special Master's petitions for fees filed with the Court. That the Special Master went to Austin, Texas, to conduct archival research, but not New Mexico or other locations, creates a question of whether the research was complete.

(2007). This applies to the factual allegations of a complaint. It requires "some minimal factual exposition sufficient to state a claim that is 'plausible on its face' in order to survive a motion to dismiss." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE, § 12.34[1][a] (3d ed. 2017). Under Rule 12(b)(6), the Court must accept the plaintiff's factual allegation as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). *See* First Interim Report at 187-237.

Pursuant to Rule 12(b)(6), the only issue before the Special Master was whether there was a plausible claim upon which relief could be granted. Compact interpretation can be governed by contract law. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Any ambiguities in a contract that is the subject of a claim prevent dismissal on a motion for failure to state a claim. *See Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992) ("the construction of ambiguous contract provisions is a factual determination that precludes dismissal on a motion for failure to state a claim.").

In this case, the Special Master went far beyond what was essential to resolve New Mexico's Motions to Dismiss. Without an answer, counterclaims, cross-claims, discovery, and evidence at trial that could be marshalled and vetted by the parties, the First Interim Report went to the merits. Premature findings include that: 1) "the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte

Reservoir" (First Interim Report at 197); 2) "the equitable appointment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law" (*id.* at 211); 3) "New Mexico . . . may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for deliveries pursuant to the administration of the Rio Grande Project (*id.* at 213); 4) water released from Elephant Butte Reservoir "has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico" (*id.* at 213); 5) "New Mexico . . . relinquished its own rights to the water it delivers in Elephant Butte Reservoir, allocating the rights to that water instead to the Rio Grande Project to irrigation lands in Texas and lower New Mexico" (*id.* at 216); and 6) the United States can pursue "federal reclamation law claims" under the Court's discretionary, non-exclusive original jurisdiction pursuant to §1251(b)(2) based upon its allegation that all surface water and groundwater below Elephant Butte Reservoir is Project water and no one can divert surface and groundwater without a federal contract (*id.* at 231-34).

On what should have been a narrow ruling on a motion to dismiss, without taking evidence from the parties related to the history of the Rio Grande Compact, its historical operation and administration in

Colorado, New Mexico and Texas, and the states' previous actions under the Compact, including related litigation of the Rio Grande Compact, the Special Master has made extreme rulings that go to the merits that result in: 1) taking the unambiguous Article IV of the Compact which defines New Mexico's deliveries into Elephant Butte Reservoir and turning it into a state line delivery obligation based upon 1938 conditions, all of which turns on the Special Master's interpretation of "deliver"; and 2) giving the United States control over all groundwater and surface water in the Lower Rio Grande, usurping New Mexico's jurisdiction over these water resources within its borders. These conclusions significantly undermine the State's responsibility to administer, and the stakeholders' opportunity to interact with the State administration. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Because the parties did not have the opportunity to review or respond to the evidence the Special Master independently collected and analyzed, including procedural protection if the evidence was taken at trial pursuant to the Federal Rules of Evidence, they have been denied due process. The Special Master should have made a narrow ruling on the Rule 12(b)(6) motions and fleshed out the evidence at trial. For these reasons, the First Interim Report should be rejected.

POINT II

THE SPECIAL MASTER FAILED TO CONSIDER TEXAS' PREVIOUS LAWSUITS ON THE RIO GRANDE

In its Complaint, Texas asserts that it entered into the Rio Grande Compact under the premise that the Rio Grande Project's allocations to Texas were recognized and protected by the Rio Grande Compact. Texas' Complaint at ¶ 11. Moreover, Texas claimed that it assumed that New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico. *Id.*

In subsequent paragraphs of the Complaint, Texas links the actual apportionment provisions of Articles III and IV to the Rio Grande Project. *See* Texas' Complaint at ¶ 12, 13.

In relevant part, ¶ 18 states:

> New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and

> authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas.

See Texas' Complaint at ¶ 18.

None of these paragraphs identify an amount of water that Texas claims it has been shorted. None identify the period of record over which the alleged shortfalls occurred. These issues are basic to understanding the vulnerability of New Mexico interests to Texas' allegations.

The Special Master has an exhaustive exposition of the "background" or "context" to the Compact. First Interim Report at 9-187. Importantly, it does not contain a description of the two lawsuits filed by Texas in 1951 and 1967, beyond one cursory mention of them, where Texas made allegations of injury under the Compact, but without reference to or allegations of depletions of releases below Elephant Butte Dam. Texas' putative case and the Special Master's description of background ignores the history of Compact administration and of two previous actions filed by Texas. *See Texas v. New Mexico*, No. 9, Original, 344 U.S. 906 (1952); *Texas & New Mexico v. Colorado*, No. 29, Original, 389 U.S. 1000 (1967).

Compact administration can be divided into five periods: (i) 1939-1942; (ii) 1942-1985; (iii) 1985-1995; (iv) 1995-present; and (v) 2008-present. They correspond to the following:

- The period of 1939-1942 is the period in which Compact procedures were established and the first "actual spill" occurred in 1942.

- The second period from 1942-1985 was a period in which the two upstream states of Colorado and New Mexico amassed large accrued debits. Two lawsuits were filed: (i) *Texas v. New Mexico*, No. 9, Original, in which Texas claimed Compact violations against New Mexico based on New Mexico's storage practices in El Vado Reservoir, which Texas claimed were contrary to Articles VII and VIII of the Rio Grande Compact; and (ii) *New Mexico and Texas v. Colorado*, No. 29, Original, in which New Mexico and Texas challenged Colorado's accrued debit as a violation of Article VI when it reached nearly one million acre-feet.

- The third period of record, 1985-1995, was a period in which there were actual spills of usable water in 1985, 1986, 1987, 1988, 1994 (not a spill of usable water), and 1995.

- The fourth period of record from 1995 to the present has been a period in which New Mexico has enjoyed credit status.

- The fifth period of record, which overlaps the fourth, relates to administration under the 2008 Operating Agreement in which New Mexico has received much less than 57% of the surface water than was originally allocated.

In 1951, Texas sought leave to file a Complaint in *Texas v. New Mexico*, No. 9, Original, 344 U.S. 906 (1952), Texas claimed that unless its rights under the Compact were enforced "defendants will continue to wrongfully store, divert, and use waters of the Rio Grande in violation of the rights of the State of Texas and its citizens under said Compact. . . ." Texas Complaint at ¶ X in No. 9, Original. Suit was filed when New Mexico's accrued debit reached 263,100 acre-feet on January 1, 1951. *Id.* at ¶ VI. This was based on alleged storage of water in excess of accrued debits pursuant to Art. VII of the Compact. Texas sought an injunction restraining New Mexico from storing water in El Vado Reservoir, or any other post-1929 upstream reservoir, when there was less than 400,000 acre-feet of water in project storage in Elephant Butte Reservoir, and that New Mexico and the Middle Rio Grande Conservancy District ("MRGCD") be enjoined from diverting native water when its accrued debits were more than 200,000 acre-feet. *Id.* Both Texas and New Mexico pled that New Mexico's delivery obligation was into Elephant Butte Reservoir. New Mexico pled:

> The compact provides that New Mexico make certain deliveries at the San Marcial gaging station located some 165 miles northerly from

> the Texas-New Mexico boundary. Water so delivered at the San Marcial gaging station is utilized for the satisfaction of the international obligation of the United States to deliver water at Juarez, Mexico, and to satisfy contract obligations of the United States Bureau of Reclamation to deliver water for the irrigation of some 86,000 acres of land in the Elephant Butte Irrigation District in New Mexico and the irrigation of some 64,000 acres of land in El Paso County Water Improvement District No. 1 in Texas. The obligation of New Mexico to deliver and the right of Texas to receive water at the Texas-New Mexico boundary line has never been defined in any way.

See New Mexico Answer at ¶ 3. Texas alleged that "[t]he supply of water required by the Compact to be delivered by New Mexico into Elephant Butte Reservoir . . . has been seriously diminished. . . ." Texas' Complaint in No. 9, Original, at ¶ VII.

The case was dismissed because of the failure of Texas to join the United States as an indispensable party given its fiduciary obligation to New Mexico tribal communities on the Middle Rio Grande with storage rights in El Vado Reservoir. *See Texas v. New Mexico*, 352 U.S. 991 (1957).

Significantly, Texas made no claim as to the depletion of releases below Elephant Butte Reservoir in that case. No parties were placed on notice that Texas suffered injury by diversions below Elephant Butte Reservoir in the 1948-1951 period of record, and therefore

Las Cruces' development of its well field north of the New Mexico-Texas state line continued through the state process.

Dismissal of *Texas v. New Mexico*, No. 9, Original, was followed by years of accounting debits by New Mexico and Colorado. In 1967, after Colorado's accrued debit had reached 939,900 acre-feet (New Mexico's accrued debit in 1965 was 420,000 acre-feet), Texas, joined by New Mexico, filed suit against Colorado. Colorado's Counterclaim referenced Elephant Butte Reservoir as the point where New Mexico's delivery obligation was established. *See* Colorado Counterclaim in No. 29, Original, ¶ IV.

On April 17, 1969, the states signed a Joint Motion for Continuance. On April 19, the United States filed a Motion for Relief seeking leave for the United States to intervene.

On July 2, 1985, the Rio Grande Compact Commission determined that "pursuant to the May 13, 1985 agreement an actual spill of usable water, as defined by Article I of the Rio Grande Compact, had occurred on June 13, 1985, and that all previously accrued water debits of Colorado and New Mexico were cancelled." Accordingly, the three states moved to dismiss the 1969 case. No allegations were made with respect to depletions of releases from Elephant Butte Reservoir. The City continued development of its well field.[9]

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[9] *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) construed the Rio Grande Compact to

Having pled causes of action under the Rio Grande Compact twice, omitting any allegations of depletions below Elephant Butte Reservoir, Texas is barred by acquiesence from relitigating issues which could have been pled in No. 9, Original, or No. 29, Original, and imposing injunctions on the river which limit Las Cruces' groundwater rights. Texas has acquiesced in the development of the City well field.

Supreme Court precedent in *Washington v. Oregon*, 297 U.S. 517 (1936), provides authority on laches in interstate law. In *Washington v. Oregon*, the division of the interstate waters of the Walla Walla River between Oregon and Washington was affected by a protracted period of non-use, and delay in building infrastructure by Gardena Farms in Washington, an irrigation district in that state. A principle extracted by the Court was that enjoining possessory interests that had been enjoyed for half a century created an unpassable burden of proof on the plaintiff.

A similar issue was raised in *Nebraska v. Wyoming*, 507 U.S. 584 (1993). That case was an original action brought by the State of Nebraska to enforce the 1945 North Platte Decree issued in *Nebraska v. Wyoming*, 325 U.S. 665 (1945). An issue in the case concerned the Inland Lakes which consist of four-off channel reservoirs served by the Interstate Canal, which diverts from the North Platte River at Whelan,

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"not apportion any specified amount of water to Texas below Elephant Butte" and require New Mexico's deliveries at Elephant Butte Reservoir, not the state line. 563 at 385.

Wyoming. Both the Inland Lakes and the Interstate Canal are part of the North Platte Project, a series of reservoirs and canals operated by the Bureau of Reclamation and spanning two states, *i.e.*, Wyoming and Nebraska, even as the Rio Grande Project spans the states of New Mexico and Texas. It was undisputed that since 1913 the Bureau of Reclamation had diverted water through the Interstate Canal for storage in the Inland Lakes during non irrigation months for release to Nebraska water uses during the irrigation season. The Inland Lakes had always been operated with a December 6, 1904, priority date that Wyoming recognized for other components of the North Platte Project. However, an issue arose because the Bureau of Reclamation had never obtained separate Wyoming storage permits for the Inland Lakes.

In that original action, Nebraska and the United States moved for summary judgment "seeking determinations that the decree entitles the Bureau to continue its longstanding diversion and storage practices and that the Inland Lakes have a priority date of December 6, 1904." *See Nebraska v. Wyoming*, 507 U.S. 589, 594 (1993). The Special Master recommended granting the motions for summary judgment of Nebraska and the United States ruling "[t]hat the Bureau lacks a separate Wyoming permit for the Inland Lakes . . . is immaterial because the question of the Inland Lakes' priority was determined in the original proceedings." *Id.* at 594. The Court also reasoned that "even if the issue was not previously determined, we would

agree with the Special Master that Wyoming's arguments are foreclosed by its post decree acquiescence." *Cf. Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) ("[P]roceedings under this Court's original jurisdiction are basically equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence") (citations omitted)) 507 U.S. at 595.

In the instant case, the *Nebraska v. Wyoming* criterion of a previous determination of the issue has been satisfied.

POINT III

THE SPECIAL MASTER'S RECOMMENDATION THAT THE UNITED STATES PARTICIPATE PURSUANT TO 28 U.S.C. § 1251(b)(2) CREATES A CONFLICT WITH THE STREAM SYSTEM ADJUDICATION

The state adjudication is critical because the Special Master misinterprets *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The Special Master suggests that because the Rio Grande Project is the vehicle by which the states agreed upon an interstate allocation of water as between them, it somehow cloaks those water rights with a special status that removes them from state jurisdiction or administration, including priority enforcement. *See* First Interim Report at 211-17. *Hinderlider* does not stand for the proposition that a corpus of water that is the subject on an interstate compact or an equitable appointment is not subject to state jurisdiction

or administration. Instead, that case stands for the proposition that a state court decree cannot confer a right in the waters of an interstate stream in excess of the state's equitable share. *Hinderlider*, 304 U.S. at 102. In other words, while each upstream state to an interstate water compact or equitable apportionment has an obligation to provide water to the downstream state, how it complies with that interstate obligation is entirely within the upstream state's discretion. The upstream state does not lose jurisdiction over some subset of its appropriators who obtained their water rights under state law simply because of the existence of an interstate compact or equitable apportionment. Accordingly, because New Mexico is charged with meeting its interstate water obligations to Texas under the Rio Grande Compact, it is essential for New Mexico to complete its LRG Adjudication so it can administer intrastate water rights among all its water users to comply with the Compact.

Accordingly, the Special Master's treatment of the United States creates a practical problem for stakeholders like Las Cruces who are engaged in the LRG Adjudication to quantify their water rights. The adjudication pending in state court serves to determine the rights of stakeholders in the Lower Rio Grande. *See* NMSA 1978, § 72-4-13 *et seq.* (1907). It also provides for *inter se* challenges among defendants. The "removal" of the federal claims to the Supreme Court under 28 U.S.C. § 1251(b)(2) excludes the stakeholders, and leaves the adjudication of the United States' interest, which is now complete, in question.

The Special Master recommended granting New Mexico's Motion to Dismiss the United States' Complaint in Intervention on the grounds that the United States did not assert "violations [which] have the effect of undermining [its own] apportionment [of water]." First Interim Report at 231. The Special Master found that "[t]he 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the Compact against New Mexico." *Id.*

The United States' Complaint in Intervention at ¶ 13 alleged that "New Mexico has allowed the diversion of surface and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contracted amounts." *Id.* at 217. The Special Master characterized the United States' Complaint as seeking "declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to interrupt or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference." *Id.* at 218. The United States' Complaint in Intervention effectively asserts a claim to the groundwater in storage in the Lower Rio Grande.

The Special Master recommended that "[d]espite the fact that the United States is prohibited as a

non-signatory to the 1938 Compact from asserting claims under that compact, it nevertheless has stated a plausible claim against New Mexico under federal reclamation law:. . . ." *Id.* at 231. Having found that because the United States has not stated a cause of action under the Rio Grande Compact "its claims cannot be properly resolved by the Supreme Court pursuant to its original and exclusive jurisdiction, which is reserved for resolution of 'controversies between two or more states.' 28 U.S.C. § 1251(a)." *Id.* at 232-33. He recommended the Court exercise its non-exclusive original jurisdiction under 28 U.S.C. § 1251(b)(2). His basis for doing so is that the United States' interest involves "more than 'competing claims to water within a single State,' over which the Court has expressed reluctance to exercise its original jurisdiction," citing *United States v. Nevada and California*, 412 U.S. 534, 538 (1973). *Id.* at 235.

However, the United States' "Project claims" have been presented and determined in *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996). This includes its claim to groundwater, amount of water, purpose and place of use, and priority date. Having been properly joined to the State court proceedings by the McCarran Amendment, the determination of the United States' interest is factual and binding. *See United States v. City of Las Cruces et al.*, 289 F.3d 1170 (10th Cir. 2002). The Special Master's recommendation creates the problem of relitigating the issues already determined in state court without the participation by

other water users like Las Cruces. In such circumstances, the Court has frequently abstained.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court recognized that despite the "virtually unflagging obligation" of the federal courts to exercise jurisdiction vested by the Congress, the federal courts should defer to concurrent state court proceedings if certain criteria are satisfied. 424 U.S. at 817. Indeed, the general proposition that a federal court has a virtually unflagging obligation to exercise its federal jurisdiction, "gives substantially less guidance to the court in water rights litigation than might otherwise be the case because a water rights adjudication is a 'virtually unique type of proceeding' and the McCarran Amendment is a 'virtually unique federal statute.'" *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1443 (10th Cir. 1984) (citing *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983)).

In *Colorado River*, the United States brought suit in federal district court against some 1,000 water right claimants, seeking the declaration of its rights to waters in certain rivers and their tributaries within Colorado. 424 U.S. at 805. A water rights adjudication was already pending in Colorado state court when the federal proceeding was initiated. That adjudication was being conducted pursuant to a comprehensive statutory scheme enacted by the Colorado legislature for the adjudication of all water right claims in the state. The United States was subsequently joined in the state

court adjudication pursuant to the McCarran Amendment.[10] Several defendants and intervenors in the federal proceeding then sought dismissal of the federal proceeding. The Court held that, although dismissal of the federal district court case in favor of the pending state court adjudication was not appropriate on traditional abstention grounds, dismissal of the district court proceeding was, nonetheless, appropriate out of "considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817 (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

By far the most important factor counseling for abstention by the *Colorado River* Court was the McCarran Amendment, and the policies underlying the Amendment. 424 U.S. at 819-20. The McCarran Amendment expressly waives the sovereign immunity of the United States and allows joinder of the United States in the state courts in controversies involving the adjudication of rights to the use of water under state law. 43 U.S.C. § 666(a). The Amendment is clear evidence of congressional deference to the state courts for the adjudication of the water rights of all claimants, including federal claimants. The Senate Report on the McCarran Amendment observed:

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[10] In contrast to *Colorado River* where the United States was not joined in the state court adjudication until after the federal action was filed, here, the United States has been a party to the state court adjudication in the Lower Rio Grande from the very beginning.

> In the administration of and the adjudication of water rights under State law the State Courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

S.Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951), cited in *Colorado River*, 424 U.S. at 811. In addition to manifesting a clear deference to the states in the administration and adjudication of water rights, the Senate Report emphasizes Congress' recognition of the interdependence of all water rights claims in a stream system, and the risk of inconsistent decrees unless the United States is amenable to suit in the states' courts and bound by their decrees. The Court has interpreted the McCarran Amendment broadly and has repeatedly refused to narrow its applicability where adjudications of a river system are concerned. *See, e.g., Arizona v. San*

Carlos Apache Tribe, 463 U.S. 545, 570 (1983) (McCarran Amendment waives Indian sovereign immunity in all states); *Colorado River*, 424 U.S. at 811 (waiver applies to adjudication of federal reserved water rights held by the United States in trust for Indians); *United States v. District Court of Eagle, Colo.*, 401 U.S. 520, 524 (1971) (McCarran Amendment is "all-inclusive," and applies to federal reserved water rights appurtenant to national forest lands).

The Court's chief concern in *Colorado River* was with the avoidance of piecemeal adjudication of water rights in a river system. 424 U.S. at 819. The Court explained that this concern also underlies the rule which requires that jurisdiction be yielded to the court which first acquires control of property. The concern is with the potential for inconsistent dispositions of property through multiple litigations. *Id.* at 819. That concern is:

> heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. [citation omitted]. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

The concern identified by the Court in *Colorado River* would be raised by accepting the Special Master's recommendation here. Not only would duplicative proceedings result, but indispensable parties could be excluded. Perhaps most importantly, the United States would be given leave to become the administrator of water rights in the Lower Rio Grande if it prevailed in its contention that contracts were required of groundwater users in the basin. *See* United States' Complaint in Intervention at ¶¶ 12, 13, and Prayer for Relief. If the United States were to prevail, the circumstance sought to be avoided by the McCarran Amendment and *Colorado River* abstention would arise through an alternative permitting process by federal contract that supplants vested state rights and administration – exactly what *Colorado River* sought to preclude.

CONCLUSION

The Special Master's extensive research into extrinsic materials, *viz.*, primary and secondary sources documents gathered from various record collections and archives, went significantly beyond what was in the parties' pleadings and beyond documents with which judicial notice could be taken. Compounding the issue, the Special Master cites those documents, not as "background," but in his analysis and recommendations on the merits regarding Rio Grande Compact interpretation. The record in this regard should not, and cannot, be created without the parties' ability to participate as is typically done in the development of a

case through answers, counterclaims, cross-claims, discovery, and trial, where evidence can be marshalled and vetted. In making his recommendations, the Special Master has not considered or addressed important case law and legal principles, such as the previous litigation in *Texas v. New Mexico*, No. 9, Original, *Texas v. New Mexico*, No. 29, Original, and that claims can be barred by latches and acquiesce. Accordingly, his recommendations go too far into deciding the merits and are premature.

Finally, by recommending that the United States be allowed to pursue federal Reclamation claims, but not Compact claims, in this case pursuant to the Court's discretionary, non-exclusive original jurisdiction, the Special Master has created a potential conflict with the LRG Adjudication directly contrary to the *Colorado River* abstention doctrine which is so prevalent in western water law. For these reasons, the Court should reject the First Interim Report and grant New Mexico's Motion to Dismiss the United States' Complaint in Intervention.

Respectfully submitted,

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RECORD AND BRIEFS

No. 141, Original

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In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NEW MEXICO PECAN GROWERS IN SUPPORT OF DEFENDANT STATE OF NEW MEXICO

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), New Mexico Pecan Growers ("NMPG") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Defendant State of New Mexico. NMPG provided notice of its intent to file this brief to the parties and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas does not consent to the filing of this brief.

This is an original action brought by Texas and the United States alleging that New Mexico has breached the Rio Grande Compact ("Compact"). *See* Act of May 31, 1939, ch. 155, 53 Stat. Under the Compact, New Mexico is required to deliver a specified quantity of water to Elephant Butte Reservoir, the main storage reservoir of the Rio Grande Project ("Project"), a federal Bureau of Reclamation project. Elephant Butte Reservoir is located approximately 105 miles north of the Texas state line.

Texas alleges that New Mexico has depleted Texas' equitable apportionment of water released from Elephant Butte by intercepting water intended for use in Texas. The United States alleges New Mexico is allowing the use of waters released from Elephant Butte by users who either do not have contracts with the Secretary of the Interior, or are using water in excess of contractual amounts, thereby interfering with its obligations to deliver water to the Project's beneficiaries and Mexico pursuant to the Convention of 1906.

The Court invited New Mexico to file a motion to dismiss the complaints of Texas and the United States, which New Mexico did. The motion was referred to Special Master Gregory Grimsal for his consideration and recommendation. In the First Interim Report of the Special Master filed with the Court on March 20, 2017, the Special Master concludes that Texas has pled a breach of Compact claim and recommends New Mexico's motion to dismiss Texas' Complaint be denied. He also concludes that while the United States has not stated a claim under the Compact, the Court should exercise its non-exclusive jurisdiction to determine the United States' allegations against New Mexico under reclamation law.

NMPG does not dispute the Special Master's recommendations for final disposition of New Mexico's motion to dismiss. It does contend, however, that the Special Master prematurely considered historical facts not offered by the parties to support his interpretation of the Compact as requiring New Mexico's relinquishment of its control over water below Elephant Butte. NMPG's *amicus curiae* brief illustrates that the Special Master's analysis is incomplete, thereby necessitating a full development of the record before a determination of New Mexico's authority over waters within its boundaries can be made.

NMPG is a New Mexico non-profit organization formed in 2006 to promote and protect the interests of pecan growers in New Mexico. NMPG's members irrigate approximately 25,000 acres of orchards within the

Elephant Butte Irrigation District ("EBID") with surface water released from Elephant Butte. They also irrigate their orchards with groundwater from wells drilled in New Mexico's Lower Rio Grande Groundwater basin below Elephant Butte Reservoir.

Reliable access to irrigation water is absolutely vital to pecan farmers because their orchards are a permanent crop that cannot be fallowed. Accordingly, they have invested extensively to procure reliable sources of groundwater to protect against surface water shortages. Due to recent changes in Project operations to deliver more water to Texas, and the severest drought on record in New Mexico, pecan farmers have had to rely more heavily on groundwater to irrigate their orchards.

NMPG's members' interests in this matter are two pronged. First, as irrigators within EBID who have established water rights in surface water delivered from the Project, they have an interest in ensuring their entitlement to Project supply is protected under the Compact. Second, as irrigators who have also established water rights in groundwater, they have an interest in ensuring that their groundwater rights remain exercisable in accordance with New Mexico law.

New Mexico seeks to protect its sovereignty over its waters. While NMPG agrees that New Mexico's sovereignty must be protected, NMPG also has a unique interest in protecting its members' two-pronged interests in Project water and groundwater. Thus, NMPG raises significant points in its *amicus curiae* brief that

NMPG cannot reasonably expect New Mexico to fully develop.

NMPG's members have a direct stake in this controversy, and its participation will contribute to a full and fair exposition of the issues involved. *See, e.g.*, Special Master's First Interim Report at 267 (encouraging EBID's participation as *amicus curiae* to "ensure a full and fair exposition of the factual and legal issues"). In these circumstances, NMPG's *amicus* participation is appropriate.

NMPG respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae* in support of Defendant State of New Mexico.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

New Mexico Pecan Growers ("NMPG") is a New Mexico non-profit organization formed in 2006 to promote and protect the interests of pecan growers in New Mexico. Its 302 members own pecan orchards throughout central and southern New Mexico, the majority of which are located in the Mesilla Valley in Dona Ana County. NMPG's members irrigate approximately 25,000 acres of orchards within the Elephant Butte Irrigation District ("EBID") with surface water released from the Elephant Butte Reservoir, the main storage reservoir of the Bureau of Reclamation's Rio Grande Project ("Project"). They also irrigate their orchards with groundwater from wells drilled in New Mexico's Lower Rio Grande Groundwater basin.

Reliable access to irrigation water is absolutely vital to pecan farmers because their orchards are a permanent crop that cannot be fallowed. Over the past eighty years pecan growers have invested extensively to procure reliable sources of groundwater to protect against surface-water shortages and meet their orchards' needs. Like their pecan-farming neighbors in Texas, New Mexico's pecan growers have drilled wells into the aquifers underlying the Rio Grande in

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[1] NMPG provided notice of its intent to file this brief to the parties and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas does not consent to the filing of this brief. No person or entity other than New Mexico Pecan Growers has authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

accordance with applicable state laws and without interference from each other or the United States.

New Mexico's pecan growers below Elephant Butte ("lower New Mexico") have recently had to rely more heavily on groundwater as a result of two factors that have led to drastic reductions in their surface water supplies: the Operating Agreement for the Rio Grande Project executed by the United States Bureau of Reclamation, EBID, and the El Paso County Water Improvement District No. 1 ("EPCWID") on March 10, 2008 ("2008 Operating Agreement"); and severe drought. One primary purpose of the 2008 Operating Agreement is to allocate more surface water from the Project to EPCWID than was historically allocated for the purpose of "offsetting" the effects on surface water resulting from groundwater pumping in lower New Mexico. Soon after the 2008 Operating Agreement was executed, New Mexico experienced the severest drought of record, further exacerbating the effects of the new water allocation procedures within the New Mexico portion of the Project.[2]

In an effort to address the water supply stresses in lower New Mexico, NMPG, along with other major groundwater users in the Mesilla Valley, began meeting in 2011 and eventually formed the Lower Rio Grande Water Users.[3] Over the last several years the

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[2] To date, Reclamation continues to operate the Project in accordance with the 2008 Operating Agreement.

[3] The Lower Rio Grande Water Users consist of NMPG, Southern Rio Grande Diversified Crop Farmers Association, City

user group has worked with the New Mexico State Engineer, EBID and other stakeholders to develop methods by which Project supplies continue to be protected, as they are currently under the 2008 Operating Agreement, and provide efficient administrative and management mechanisms to allow groundwater users to maintain their uses to the extent possible.

NMPG has also actively participated in New Mexico's Lower Rio Grande Basin water rights adjudication on behalf of its members. It sought and secured the adjudication court's final determination of irrigation water requirements for all crops in the basin. NMPG recently worked in conjunction with the United States to secure the court's recognition of a 1903 priority date for Project water.

NMPG has an interest in providing the Court the perspective of its members who not only rely on the Project's ability to provide them reliable surface water for irrigation, but also the ability to use groundwater by virtue of their rights established under New Mexico law. It also has an interest in ensuring its members' water rights are fully protected under the Rio Grande Compact, and that the Compact is not interpreted in a manner that adversely affects their rights.

The outcome of this matter is crucial to the future of the New Mexico pecan industry and its continued ability to contribute to the state's economy. Pecans

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of Las Cruces, New Mexico State University, Public Service Company of New Mexico, Camino Real Regional Utility Authority, and Stahmanns Inc.

are the state's highest commodity crop with sales of $183 million, ranking New Mexico as the second top pecan-producing state in the nation.[4] For every 100 jobs in the New Mexico pecan industry, approximately 125 are added to other business sectors; and for every $100 increase in pecan production, approximately $80 is added to the state's economy.

SUMMARY OF ARGUMENT

The State of Texas and the United States have filed complaints to enforce their rights under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"). The Court invited the State of New Mexico to file a motion to dismiss the complaints, which New Mexico did. The Court referred New Mexico's motion to Special Master Gregory Grimsal for his consideration and recommendation. In the First Interim Report of the Special Master filed with the Court on March 20, 2017 ("Report"), the Special Master concludes that Texas has pled a breach of Compact claim and recommends New Mexico's motion to dismiss Texas' Complaint be denied. He also concludes that while the United States has not stated a claim under the Compact, the Court should exercise its non-exclusive jurisdiction under 28 U.S.C. § 1251(b)(2) to determine the United States' allegations against New Mexico under reclamation law. NMPG files this *amicus*

[4] New Mexico Department of Agriculture, *2015 New Mexico Agricultural Statistics*, 37 (November 2016), *available at* http://www.nmda.nmsu.edu/wp-content/uploads/2015/02/Ag-Stats2015.pdf.

curiae brief in support of New Mexico's exceptions to the Report and to bring to the Court's attention issues unique to NMPG's members.

NMPG does not contest the Special Master's recommended disposition of New Mexico's motion. It does, however, dispute the Special Master's interpretation of the Compact to find: 1) New Mexico relinquished control over *its own* water delivered to Elephant Butte Reservoir; and 2) the sole method by which lower New Mexico receives *its portion* of the Rio Grande is through Reclamation's administration of the Project to irrigate lands in New Mexico. *See* Report at 210-217. NMPG asks the Court to expressly refrain from adopting these conclusions. In the exercise of its original jurisdiction, the Court has traditionally allowed for full development of the record before making its determination of the nature and scope of obligations between sovereigns. *See United States v. Texas*, 339 U.S. 707, 715 (1950) (citations omitted). The issue of New Mexico's authority and control over Rio Grande water apportioned to lower New Mexico should be reserved for later judgment of the Court.

If the Compact required the Project to be the sole method by which lower New Mexico received its portion of the Rio Grande, the entire area below Elephant Butte would have been relegated to a static agrarian society in 1938. Whether intentional or not, the Special Master ignores that unappropriated groundwater and non-Project water uses existed at the time the Project was formed and when the Compact was executed. The Special Master also fails to consider that the compacting parties intended for each party to develop their

water resources as they saw fit, subject only to meeting their obligations under the Compact. Like Colorado and Texas, New Mexico treats groundwater as a resource to be developed distinct from surface water. All three states have developed groundwater in accordance with applicable common, territorial and state law prior to the construction of the Project, the negotiation of the Compact and up until the present.

Further, in finding that New Mexico has no authority over Rio Grande water apportioned to lower New Mexico under the Compact, the Special Master seemingly disregards congressional directives requiring the adjudication and distribution of water rights in reclamation projects in accordance with state law under the McCarran Amendment and Section 8 of the 1902 Reclamation Act. The Special Master cannot simply ignore that, for over a century, Congress has deferred to the operation and effect of state water law in reclamation projects.

In fact, "cooperative federalism" is playing out in New Mexico's Lower Rio Grande. Pursuant to the McCarran Amendment, the United States has been joined in the state district court's water rights adjudication for the purpose of determining its interests in the Project. The adjudication is making significant progress. In 2011, the court entered a final judgment in the stream system issue established for determining irrigation water requirements, thereby capping the total amount of groundwater that can be used for irrigation purposes in lower New Mexico. The adjudication court

also recently confirmed a senior priority date for the Project.

Pecan farmers have an interest in ensuring that all claims to use water in New Mexico's Lower Rio Grande Basin are adjudicated. Although the United States appropriated Rio Grande water for the Project, farmers who used it for irrigation on their lands own the water rights for such use. The adjudication provides the only forum for irrigators in New Mexico to obtain legal recognition of their individual rights to use surface water delivered from the Project and groundwater from their wells.

Pecan farmers also have an interest in ensuring their water rights are administered under New Mexico's priority system. While a state may not use more water than its apportionment, pecan growers in lower New Mexico were not transformed into Texans upon ratification of the Compact. They remain entitled to the continued exercise of vested water rights under New Mexico law subject to their administration as necessary to ensure New Mexico's compliance with the Compact.

For over a century New Mexico's pecan growers have established patterns of water use based on investment-backed expectations that their water rights would not only be protected by reclamation law applicable to Project water, but administered under New Mexico's priority system. Given the history of groundwater development for irrigation purposes within the Project on both sides of the border, it is inconceivable

that unbeknownst to New Mexico's farmers, their state-recognized groundwater rights are invalid because New Mexico relinquished authority to control and administer its apportionment of water under the Compact to Reclamation in 1938.

The Court should reject the Report's conclusions that New Mexico relinquished its authority over water within its boundaries, and that the Project is the sole method by which lower New Mexico receives its apportionment. Rather, the parties should be afforded the opportunity to develop a full record on these issues.

ARGUMENT

I. The Special Master fails to consider the compacting states' development of groundwater prior to and after the Compact.

NMPG does not dispute that the Compact requires Texas receive its apportionment of the Rio Grande from Elephant Butte via administration of the Project.[5] However, it does contest the Special Master's conclusion that Reclamation's administration of the Project provides the sole method by which lower New Mexico receives its portion of the Rio Grande. *See* Report at 210-217. If this were true, the entire area below Elephant Butte Reservoir would be relegated to a static

[5] The Project is currently being administered under the 2008 Operating Agreement which provides Texas more than its pro-rata share of Project water to address impacts to the Rio Grande resulting from groundwater pumping in New Mexico.

agrarian society, forever limited to using only surface water for irrigation purposes and nothing more.

The Special Master provides 156 pages of background facts, some of which were obtained from sources outside of the record, to provide historical "context" for his interpretation of the Compact. Report at 193. Not only is the Special Master's approach in resolving a motion to dismiss unorthodox, it is incomplete. For example, it failed to identify that the compacting states expected they would be allowed to continue to develop new water resources so long as they met their delivery obligations under the Compact. This is clearly seen in the initial rules for administration of the Compact which provided the Compact "equitably apportion[s] the waters of the Rio Grande above Fort Quitman *and permits each State to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact. . . .*" Rio Grande Compact Commission, *Rules and Regulations for Administration of the Rio Grande Compact*, preamble (adopted December 19, 1939), *reprinted in* First and Second Annual Reports of the Rio Grande Compact Commission 1939 and 1940, 15 (1941) *available at* http://www2.cde.state.co.us/artemis/rgc_rrcserials/rgc11internet/rgc11193940internet.pdf.

The Special Master's failure to recognize this important fact is a consequence of his overly-narrow focus on the development of surface water uses in the basin. For instance, when he explores the relevance of Colorado attempting to import the "status quo" of the interim 1929 Rio Grande Compact ("1929 Interim

Compact") to the negotiations of the final Compact, the Special Master points to the following language from Article VII of the 1929 Interim Compact:

> . . . [A]nd that the Commission so named shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the Compact.

Report at 142. From that language, the Special Master concludes "the 'conditions obtaining on the *river*' at the signing of the 1929 Interim Compact included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation." *Id.* (emphasis added). His analysis ignores Article VII's additional reference to conditions "within the Rio Grande *basin*" at the signing of the 1929 Interim Compact. *Id.* (emphasis added). Article VII's reference to conditions "within the basin" would have encompassed all existing water uses, including groundwater uses, and unappropriated groundwater in storage. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 187-188 (1982) (in a proceeding for the equitable apportionment of an interstate river there is a need to protect established water uses but it is also appropriate to consider additional factors relevant to a just apportionment). The protection of all existing rights is also seen in Article XII of the 1929 Interim Compact wherein New Mexico and Texas agreed that "*prior vested rights* above *and below* Elephant Butte Reservoir shall never be impaired hereby." Act of June 17, 1930, ch. 506, 46 Stat. 772 (emphasis added).

In fact, all three compacting states were developing groundwater from aquifers underlying the Rio Grande even before Congress authorized the Project in 1905. *See generally* John J. Vernon, Francis E. Lester, *Pumping for Irrigation from Wells*, N.M. College of Ag. and Mech. Arts: Bul. No. 45, Tables 9-13 (1903), *available at* http://contentdm.nmsu.edu/cdm/compoundobject/collection/AgCircs/id/16632/rec/41 (providing data for existing groundwater wells in New Mexico and Texas); William J. Powell, *Ground-water Resources of the San Luis Valley, Colorado*: U.S. Geol. Survey Water-Supply Paper 1379, 6 (1958), *available at* https://pubs.usgs.gov/wsp/1379/report.pdf (describing wells in Colorado's San Luis Valley as early as 1887). Investigations to determine the extent of groundwater storage below the El Paso and Mesilla valleys were occurring at the same time Reclamation was working to solve the surface-water supply problems in the lower Rio Grande basin. *See* Charles S. Slichter, *Observations on the Ground Waters of the Rio Grande Valley*, U.S. Geol. Survey Water-Supply Paper 141 (1905) *available at* https://pubs.er.usgs.gov/publication/wsp141. Specific attention was given to testing existing wells to determine the potential for expanding groundwater use for irrigation. *Id.* In 1905 it was noted that "[o]wing to frequent shortage in the river supply of water," a number of wells were drilled in the Mesilla Valley and used for "obtaining ground water for irrigation." *Id.* at 22. When droughts resulted in reduced surface-water supplies, the compacting states turned to groundwater storage to meet their needs. "A major asset of the upper Rio Grande [was] the facilities for water storage, partly in

surface reservoirs but dominantly in ground-water reservoirs." H. E. Thomas, *Effects of Drought in the Rio Grande Basin*, U.S. Geol. Survey Water-Supply Paper 372-D (1963), *available at* https://pubs.usgs.gov/pp/0372d/report.pdf.

New Mexico, in particular, began establishing the legal right to use groundwater long before its statehood. *See generally* Ira. G. Clark, *Water in New Mexico: A History of its Management and Use* 234 (1987) (containing a discussion of the various rules states developed to govern groundwater appropriations). It eventually codified the common law applicable to the appropriation of groundwater in separate statutory sections than those applicable to surface water. *See* 1907 N.M. Laws, ch. 49 (surface water); 1931 N.M. Laws, ch. 131 (groundwater). However, both codes incorporated the doctrine of prior appropriation, which has always been the law governing the appropriation of surface water and groundwater in New Mexico. *Yeo v. Tweedy*, 286 P. 970 (N.M. 1929). The prior appropriation doctrine generally provides that the state owns water subject to its citizens' use for beneficial purposes, and it is allocated based upon the fundamental rule that the first person to use water possesses the absolute right to its future use as against all later users. *See Montana v. Wyoming*, 563 U.S. 368, 375-376 (2011) (providing general description of the prior appropriation doctrine adopted by western states); N.M. Const. art. XVI, §§ 2, 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water"

and "[p]riority of appropriation shall give the better right.").

In contrast, Texas has never applied the prior appropriation doctrine to groundwater development. Rather, groundwater use is allowed in accordance with the "rule of capture." The rule generally provides that groundwater underlying land is the private property of the landowner and can be pumped and "captured" without limitation or liability to surrounding landowners. *See* Tex. Water Code Ann. § 36.002(a) (2011) (landowner owns the groundwater below the surface of the landowner's land as real property).

After the construction of Elephant Butte Reservoir was completed, groundwater development in Texas and lower New Mexico proceeded at a relatively slow pace because sufficient surface water was available for storage in the reservoir for a number of years. In the mid-1940s drought conditions greatly impacted water deliveries to Elephant Butte and eventually resulted in below-normal water releases in the 1950s. Thomas, *supra* at D18. During this time, irrigation water requirements could be met only by pumping from groundwater reservoirs. *Id.* It is estimated that by the mid-to-late 1950s, 1,200 wells had been drilled to irrigate Project lands in New Mexico, and approximate 500 irrigation wells had been drilled in the El Paso area.[6] *Id.* at D14-D16. Drought conditions led the

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[6] Colorado's San Luis Valley had up to 7,500 artesian wells and 1,300 unconfined groundwater wells around this time. Powell *supra* at 27, 57.

United States Geological Survey to investigate the feasibility of using groundwater to supplement the Project's surface water supplies. *See* C. S. Conover, *Ground-water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico*, U.S. Geol. Survey Water-Supply Paper 1230, 4 (1954), *available at* https://pubs.usgs.gov/wsp/1230/report.pdf. By the mid-1970s, more than 800 irrigation wells in the El Paso valley were available to provide supplemental water for irrigation purposes. J. C. Day, *International Aquifer Management: The Hueco Bolson on the Rio Grande River*, 18 Nat. Resources J. 163, 174 (1978), *available at* digitalrepository.unm.edu/cgi/viewcontent.cgi?article=3118&context=nrj.

Towns and cities in the Mesilla and El Paso valleys also developed groundwater for public water supply. The City of Las Cruces, for example, has exclusively used groundwater to meet its needs since 1905. The City of El Paso relies on Rio Grande surface water in addition to groundwater from several large-capacity wells first drilled near Canutillo, Texas in the 1950s. E. R. Leggat, *et al.*, *Ground-water Resources of the Lower Mesilla Valley, Texas and New Mexico*, U.S. Geol. Survey Water-Supply Paper 1669-AA, AA 13 (1963), *available at* https://pubs.usgs.gov/wsp/1669aa/report.pdf. El Paso also attempted to drill 326 wells in New Mexico to export groundwater to Texas. When the New Mexico State Engineer denied El Paso's well applications, it sued New Mexico in federal district court, wherein the court observed that groundwater pumping could be permitted "even assuming the Compact protects

surface water rights within the Rio Grande Project from impairment through pumping of hydrologically connected ground water." *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379, 382 (D.N.M. 1983). In such case, "[t]he State Engineer need only condition ground water permits to require offsets of the effects on the river through return flows or retirement of prior surface and/or ground water rights." *Id.*

City of El Paso recognized that where a hydrologic connection between unappropriated groundwater and surface water exists, New Mexico has conjunctively managed both resources under the prior appropriation doctrine to protect existing water rights. *See City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1962) (unappropriated groundwater may be taken for beneficial use, but impacts to the Rio Grande must be offset to protect existing water rights). The application of this management tool is expressly required in the New Mexico State Engineer's guidelines for the Mesilla basin in lower New Mexico. *See Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications* (1999), *available at* http://www.ose.state.nm.us/RulesRegs/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf. Except for *de minimis* uses, the guidelines require applications for groundwater appropriations to "offset 100% of the surface water depletions caused by the appropriation." *Id.* at 4.

As shown above, the Special Master failed to consider the compacting parties' development of groundwater uses when he concluded the Project is the sole

method by which New Mexico receives its apportionment of water below Elephant Butte. The parties' "'course of performance under the Compact is highly significant' evidence of [their] understanding of the compact's terms." *See Tarrant Regional Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2135 (2013) (*quoting Alabama v. North Carolina*, 560 U.S. 330 (2010)). The rules of the first Compact commission in 1939, together with the history of groundwater development by all three compacting states, provides significant evidence that each state intended to retain control over its apportionment and use of Rio Grande waters under the Compact.

II. The Special Master disregards congressional directives requiring the adjudication of the United States' Project rights in accordance with state law.

The Special Master's conclusion that New Mexico relinquished control over its water below Elephant Butte reservoir cannot be reconciled with congressional directives under Section 8 of the Reclamation Act, 43 U.S.C. § 383, which requires deference to state laws relating to the control, appropriation, use and distribution of water within reclamation projects, and the McCarran Amendment, 43 U.S.C. § 666, under which the United States waives sovereign immunity for purposes of water rights adjudication suits. To the extent these key provisions are not inconsistent with the Compact, both are applicable to New Mexico's apportionment of the Rio Grande below Elephant Butte

Reservoir. *See California v. United States*, 438 U.S. 645 (1978) (state law controls the appropriation and distribution of water for reclamation projects if not inconsistent with other congressional directives). Yet, in denying New Mexico control over its own water below Elephant Butte, the Special Master fails to provide any analysis as to whether or how the Compact conflicts with these directives. Instead, he simply applies dictionary definitions to the words "obligation" and "deliver" in Article IV of the Compact to arrive at a conclusion that dismisses Reclamation's deference to state law for 115 years. *See* Report at 196-197.

The Special Master cannot simply ignore that Congress has deferred to the operation and effect of state water law in reclamation projects for over a century. *See, e.g.*, *California*; *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law). This Court has observed the "most eloquent expression" of the need for federal projects to observe state water law is found in the Senate Report on the McCarran Amendment:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . . .

> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, *if there is to be a proper administration of the water law as it has developed over the years.*

California, 438 U.S. at 678-679 (quoting from S. Rep. No. 755, 3, 6 (1951)) (emphasis added).

In fact, the "cooperative federalism" described in *California* is playing out in New Mexico's Lower Rio Grande water rights adjudication in New Mexico's Third Judicial District Court. *See New Mexico, ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (1996) ("LRG adjudication"). Pursuant to the McCarran Amendment, the United States has been joined in the matter for the purpose of determining its interests in the Project.[7] The LRG adjudication court is charged with determining "the priority, amount, purpose, periods, and place of use of water" for over 16,000 water-rights claimants in New Mexico's Lower Rio Grande Basin. *See* N.M. Stat. Ann. § 72-4-19 (1978).

The LRG adjudication court has made significant progress. In 2011 it entered a final judgment in the stream system issue established for determining

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[7] The United States litigated against its waiver of sovereign immunity and joinder to the state court adjudication for several years. The issue was finally resolved against the United States in *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372 (N.M. Ct. App. 1993).

irrigation water requirements. *See* LRG Adjudication Court, SS-97-101 (CIR/FDR), Final Judgment (Aug. 22, 2011) ("Irrigation Judgment").[8] The Irrigation Judgment quantifies the water requirements for farmers who irrigate with Project water only, Project and groundwater combined, and groundwater only, thereby effectuating a "cap" on all irrigation pumping in the basin. *Id.* at 6-8. No party to the LRG adjudication appealed the Irrigation Judgment, including the United States, and it constitutes a final decision of the court.

The LRG adjudication court has also determined the United States' claims for the Project, confirming all but one – its claim that groundwater is a source of Project water supply. *See* LRG Adjudication, SS-97-104 (United States' Interest), Order Granting State's Motion to Dismiss United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment (Aug. 16, 2012). The adjudication court found that based on the United States' own actions and statements, such as those contained in its notice of appropriation filings made with New Mexico in 1906 and 1908, the United States only appropriated surface water for the Project. *Id.* at 6. Further, in response to the United States' claim that it retains its appropriative right for water that seeps into the ground, the court determined that surface water that seeps into an underground aquifer loses its identity as surface water under New Mexico law. *Id.* at 7 (citing *Kelley v. Carlsbad Irr. Dist.*, 415 P.2d 849, 853 (N.M. 1966)). Even so,

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[8] The LRG adjudication court's decisions are available at https://lrgadjudication.nmcourts.gov/.

the court found the United States "may pursue any administrative action available under New Mexico law" to protect Project water from other appropriations that encroach upon it. *Id.* at 4.

The LRG adjudication court recently confirmed the United States' claim of a 1903 priority date for the Project. *See* LRG Adjudication, SS-97-104 (United States' Interest), Findings of Fact and Conclusions of Law (April 17, 2017). The court found that Reclamation's surveying work at the Elephant Butte Reservoir site on March 1, 1903 constituted a sufficient first step towards the appropriation of the Rio Grande under New Mexico's relation-back doctrine to establish a 1903 priority date for Project water. *Id.* at ¶¶ 17, 28. The court's recognition of the 1903 priority date is significant because it provides farmers within EBID a priority date that is senior to all but a few other claimants that have received sub-file orders from the LRG adjudication court.[9]

A. Pecan farmers have an interest in ensuring all claims to water in New Mexico's Lower Rio Grande Basin are adjudicated.

No doubt, the United States complied with New Mexico's legal requirements when it appropriated the waters of the Rio Grande for use in the Project. Report

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[9] These sub-file orders remain subject to *inter se* objection in the adjudication. In addition, the LRG adjudication court has not yet issued an appealable judgment on the United States' interests.

at 102-106. Its appropriation, however, does not create a water right in the United States, or otherwise ameliorate state law requiring an appropriation of water *and* application of water to beneficial use to create the legal right to use water. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (government does not own water rights but appropriated water for use of land owners who became the owners of water rights through beneficial use) (quoted citation omitted); *Hudspeth County Conservation & Reclm. Dist. No. 1 v. Robbins*, 213 F.2d 425, 429 (5th Cir. 1954), *cert. denied*, 348 U.S. 833 (1954) (by appropriating and impounding the Rio Grande, the United States did not become the owner of water in its own right). Rather, the individual farmers within EBID who have put Project water to beneficial use for irrigation purposes are the owners of the water rights appurtenant to their farms. *See Ickes v. Fox*, 300 U.S. 82, 95-96 (1937) (in arid states it has long been established that the right to use irrigation water is based on beneficial use and, once established, the right is appurtenant to the land); 43 U.S.C. § 372 (the right to use water under the Reclamation Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right); N.M. Stat. Ann. § 72-5-23 (1978) (all water used for irrigation purposes shall be considered appurtenant to the land).

The LRG adjudication court provides the only forum for irrigators in New Mexico to obtain legal recognition of their individual rights to use surface water delivered from the Project and groundwater from their

wells. Their participation is crucial because the adjudication court determines the priority date and other elements that define their individual rights to use water relative to other users in New Mexico. *See, e.g.*, *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 811 (1976) (by reason of the "interlocking of adjudicated rights on any stream system," all water users on a stream are interested and necessary parties to adjudication proceedings) (quoting Senate Report on McCarran Amendment, S. Rep. No.755, 4-5 (1951)). Indeed, because the priority date for the Project applies to the individual water rights established by EBID irrigators, including pecan growers, NMPG actively participated at trial with the United States to secure confirmation of the 1903 priority for Project water. If, as the Special Master suggests, New Mexico is found to have no authority to adjudicate interests in Project water, farmers will be left without any forum to protect their individual water rights established through beneficial use under state and reclamation law.

B. Pecan farmers have an interest in ensuring adjudicated water rights are administered under New Mexico's priority system.

NMPG understands that a state may not use more water than its apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938) (requiring Colorado's administration of existing water rights to comply with Colorado's apportionment

under the La Plata River Compact). And, to the extent groundwater uses may affect the river, each compacting state must ensure their groundwater use is restricted as necessary to ensure the other states receive their apportionments of the river. *See Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042, 1050 (2015) (to the extent Nebraska's groundwater pumping depleted stream flow in the basin, it counted against its annual allotment of water under the Republican River Compact). Even so, pecan growers in lower New Mexico were not transformed into Texans upon ratification of the Compact. They have not lost the right to the continued exercise of their vested water rights under New Mexico law subject to their administration as necessary to ensure New Mexico's compliance with the Compact. *See id.*

For over a century New Mexico's pecan growers have established patterns of water use based on investment-backed expectations that their water rights would not only be protected by reclamation law applicable to Project water, but also administered under New Mexico's priority system. If the Project is the sole method by which lower New Mexico receives its equitable apportionment of the Rio Grande, then farmers' groundwater rights established and adjudicated under state law are arguably invalid or otherwise administered under federal law. Given the history of groundwater development for irrigation purposes on both sides of the border, it is inconceivable that unbeknownst to New Mexico's farmers, their state-recognized groundwater rights are invalid because New Mexico relinquished

authority to control and administer its apportionment of water under the Compact to Reclamation in 1938. This interpretation of the Compact results in the same type of "re-sorting of settled water rights" that would "reshuffle the economies in the valley" that the Colorado Supreme Court avoided when interpreting water administration requirements under the Compact. *See In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914, 923 (Colo. 1983). The Special Master's premature invitation to upend farmers' reliance on the laws of New Mexico should be refused.

CONCLUSION

Determining the extent New Mexico retained its authority over its apportionment of the Rio Grande in lower New Mexico under the Compact will require full development and consideration of evidence not yet before the Court. NMPG respectfully requests the Court to expressly refrain from adopting the Special Master's conclusions regarding the nature and scope of New

Mexico's obligations under the Compact, as these matters should be reserved for later judgment of the Court.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NEW MEXICO STATE UNIVERSITY IN SUPPORT OF DEFENDANT STATE OF NEW MEXICO

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), New Mexico State University ("NMSU") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Defendant State of New Mexico. All parties to this matter have consented to the filing of this *amicus curiae* brief except the State of Texas. Counsel for Defendant State of Colorado gave consent by email and respective counsel for Defendant State of New Mexico and Plaintiff in Intervention United States consented by letters lodged with the Clerk of this Court.

NMSU contends the Special Master's First Interim Report does not adequately consider the existence of groundwater rights. As a long-standing ground and surface water rights holder, NMSU will bring a perspective missing in these proceedings. Since its founding in 1890, NMSU has continuously made use of and relied on ground and surface water and for decades has actively participated in the state adjudication and administration of water rights in the lower Rio Grande of New Mexico.

The Report seemingly would negate the validity of lawful rights to the use of groundwater serving a population of over 200,000 people in the Mesilla Valley of New Mexico, including more than 18,000 university students, faculty and staff. By ignoring groundwater, the Report also overlooks the legal and practical requirement that ground and surface water uses from an

interconnected water resource such as the Rio Grande Basin of New Mexico must be adjudicated and administered together, under state law. The Report's recommendation that the U.S. Bureau of Reclamation take over administration of surface water, while leaving the State of New Mexico to administer groundwater, is not practical. It also contradicts this Court's repeated recognition of federal deference to state authority over intrastate water resources.

Finally, the Report recommends that the United States be permitted to make claims under reclamation law before this Court. NMSU doubts such claims can be heard in the absence of thousands of other water rights claimants who are not before this Court and are already joined in the state court proceedings. As one such party, NMSU seeks to appear as *amicus curiae* to argue that any claims asserted here by the United States may not affect the claims of unjoined claimants such as NMSU.

NMSU respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae* in support of Defendant State of New Mexico.

June 9, 2017

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INTEREST OF *AMICUS CURIAE*[1]

New Mexico State University ("NMSU") holds perhaps the oldest combined ground and surface water rights in the lower Rio Grande of New Mexico. Since its founding in 1890, NMSU has served as the State of New Mexico's land grant university. It uses both groundwater from its own wells and surface water supplied by the Rio Grande Project for irrigation of university agricultural lands, especially at its experimental and educational facilities. NMSU's main campus is located in Las Cruces and has continuously used groundwater for higher educational purposes for 127 years.

For three decades NMSU has litigated in the state court that is adjudicating all water rights of the lower Rio Grande in New Mexico. NMSU participated in appeals to the New Mexico Court of Appeals and later to the Tenth Circuit, in which each court held the state court is the appropriate forum to adjudicate water rights in the lower Rio Grande of New Mexico. In *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, the New Mexico Court of Appeals held the state court proceedings encompass a comprehensive stream system in compliance with both state law and the federal McCarran Amendment. 849 P.2d

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[1] No person or entity other than *Amicus Curiae* NMSU authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. *Amicus Curiae* NMSU provided timely notice to the parties of its intent to file this brief and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas withheld consent. With this brief NMSU has filed a motion for leave.

372, 378-379 (N.M. Ct. App. 1993), cert. denied, 849 P.2d 372 (N.M. 1993). Similarly, the Tenth Circuit abstained from hearing the United States' separate suit filed in the U.S. District Court of New Mexico to quiet title to its water rights in the Project. *United States v. City of Las Cruces, et al.*, 289 F.3d 1170 (10th Cir. 2002). Both appellate courts applied this Court's holding in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976), in favor of state jurisdiction over water.

NMSU appears as *amicus curiae* in this original action to assert the validity of its and other water rights vested under New Mexico law and the concomitant state jurisdiction over such rights, both surface and ground.

SUMMARY OF ARGUMENT

This brief addresses the neglected issue of groundwater. Although several hundred pages in length, the Special Master's First Interim Report largely confines its analysis to surface water apportioned by the Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785, and omits consideration of the groundwater resource, with significant and unwarranted implications to groundwater rights and state authority over intrastate waters. NMSU offers this *amicus* brief in support of exceptions to the Report filed by the State of New Mexico.

The Report recommends (1) denial of the State of New Mexico's Motion to dismiss the Complaint filed by

the State of Texas, *id.* at 217, and (2) granting of New Mexico's motion to dismiss the United States' Complaint in Intervention regarding claims under the Compact but recommends extending nonexclusive jurisdiction pursuant to 28 U.S.C. § 1251(b)(2), to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Project. Report at 237. The Report also makes recommendations on two motions to intervene.

NMSU does not contest the Report's conclusion that Texas states a claim under the Compact or that New Mexico's motion to dismiss should be denied. Instead, NMSU asks the Court to reject the Report's unnecessary and unsupported reasoning that ignores long-standing and valid groundwater rights in the Mesilla Valley of New Mexico and disregards well-accepted federal law that long ago granted jurisdiction to the Western States over their own waters. Nor does NMSU contest the Report's recommendation to hear the United States' related interstate claims, if any, pursuant to 28 U.S.C. § 1251(b)(2), so long as resolution of the federal claims is necessary for resolution of the Compact claims in this case. NMSU asks the Court to refrain from hearing claims of the United States that duplicate its claims already before the New Mexico state court adjudicating all claims to waters of the lower Rio Grande in New Mexico, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (N.M. 3rd Judic. Dist.) ("LRG Adjudication")

or from granting relief already within the administrative authority of the State of New Mexico.[2]

I. The Report makes the mistake of analyzing rights to and jurisdiction over surface water without considering the existence of and consequences to vested groundwater rights. The Report seems merely to assume that ground and surface water are the same resource, contrary to western water law and a specific holding in the LRG Adjudication. NMSU does not dispute that hydrologically interconnected ground and surface water must be administered together to avoid impairment of senior water rights. Nonetheless, available groundwater in storage is a precious resource that can and should be put to beneficial use. In the lower Rio Grande of New Mexico more than 200,000 people use and rely on this essential groundwater resource. All non-agricultural water users and all farms with irrigation wells depend on groundwater. The Report's reasoning unjustifiably challenges the validity of the groundwater rights of NMSU and every other groundwater user and threatens the economy and livelihood of the region.

II. The Report misses an entire body of water law dealing with unified administration of water rights and never cites or discusses the McCarran

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[2] NMSU also urges the Court to reject the Report's extensive recitation of historical facts obtained independently by the Special Master through extrinsic documents that goes well beyond the appropriate scope for consideration of a motion to dismiss. Because NMSU understands that other parties or *amici* will argue this point, NMSU does not duplicate those arguments here.

Amendment, 43 U.S.C. § 666(a), or the Court's seminal federalism holdings in *Colorado River* and *California v. United States*, 438 U.S. 645 (1978). Both the McCarran Amendment and New Mexico's adjudication statutes require unified adjudication and administration of all water uses, from whatever source. The Report's proposed elimination of the State of New Mexico's jurisdiction over its own compacted water, *id.* at 211-217, is not necessary to afford either Texas or the United States relief and contravenes enduring principles of state sovereignty over intrastate waters.

III. New Mexico allows for conjunctive administration of ground and surface water in order to afford full utilization of the State's water resources while protecting senior water rights. Permitting development of available groundwater, while protecting prior existing rights, promotes beneficial use of the State's public waters. By recommending that New Mexico relinquished sovereignty over surface water, the Report would create a disjointed and unworkable administrative scheme.

IV. Finally, allowing the United States to reassert "claims under federal reclamation law on behalf of the Rio Grande Project", Report at 237, would not promote judicial economy and would trample on the rights of parties to the ongoing state proceeding. In 2002, the Tenth Circuit firmly criticized the United States for its repeated attempts to circumvent the authority of the LRG Adjudication: "The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction." *City of Las Cruces*,

289 F.3d at 1189-1190. This Court should not allow relitigation of the same claims the Tenth Circuit in *Las Cruces* decided 15 years ago should be determined in the state court and which the state court has now determined. Permitting another bite at the apple would cause the very piecemeal litigation the Court warned against in *Colorado River* and would deny thousands of other claimants not joined in this case the opportunity to contest a competing right.

ARGUMENT

I. The Report ignores the existence of long-held and valid groundwater rights in the Mesilla Valley of New Mexico.

The Report depicts the Rio Grande Valley between Elephant Butte Reservoir and Fort Quitman, Texas as a pristine irrigation valley with no room for further human development after 1938. The Report implies that even senior groundwater right holders like NMSU, with a water right established almost 50 years before the Rio Grande Compact and senior to the Rio Grande Project, are left high and dry because Project supply "takes priority over all other appropriations granted by New Mexico." See Report at 213. This view conflicts with New Mexico's right to allocate and administer its public waters. It also diverges from the accepted and lawful practice on both sides of the state line of developing and using groundwater. The City of El Paso and other water users in El Paso County rely heavily on groundwater. In the Mesilla Valley of New Mexico all

non-agricultural uses are supplied by groundwater. A population of over 200,000 New Mexican residents relies on groundwater for domestic and municipal supply. See United States Census, Population estimates, July 1, 2016 (V2016). More than a thousand irrigators, including NMSU, who are members of Elephant Butte Irrigation District, pump groundwater to supplement surface water for their farmlands. In addition to its agricultural uses, NMSU has continually used groundwater to supply its campus population since 1890, including by installation of a pulsometer steam-powered pump in 1892. *New Mexico State University Water Plan 2002-2042: Including a History of Land and Water Resource Development from 1888-2002* (June 2003), III-12 & -16 (available: http://facilities.nmsu.edu/wpcontent/uploads/sites/57/2013/09/NMSUWaterPlan2003.pdf).

Like most Western States, New Mexico law recognizes a water right to divert and beneficially use groundwater. In 1931, the New Mexico legislature extended the state water code to underground waters, declaring water in underground streams, channels, artesian basins, lakes, and reservoirs having reasonably ascertainable boundaries to be public waters subject to appropriation for beneficial use. N.M. Stat. Ann. § 72-12-1 (1931) (the groundwater code is contained in Article 12 of Chapter 72 of the New Mexico Statutes Annotated 1978). Section 4 of the groundwater code specifically recognized groundwater rights already in existence, proclaiming: "Nothing herein contained is intended to impair the same or to disturb the priorities

thereof." § 72-12-4 (1931). In 1949, the New Mexico legislature granted the State Engineer authority over groundwater appropriations from any underground basin declared by the engineer to have "reasonably ascertainable" boundaries. N.M. Stat. Ann. § 72-12-12 (1949). The State Engineer has carried out the process of making such declarations basin by basin and now all underground basins within the State fall under the State Engineer's authority. The State Engineer declared the Lower Rio Grande Basin of New Mexico in 1980. New Mexico Office of the State Engineer, Memorandum, Subject: Lower Rio Grande (Sept. 10, 1980). See *City of El Paso v. Reynolds*, 563 F. Supp. 379, 380 (D.N.M. 1983).

Although the groundwater code was not included in the 1907 state water code, the New Mexico Supreme Court has held time after time that a right to groundwater stands on equal footing with a right to surface water:

> This thought stands out in the opinion and holding of the court, namely, that legislative enactments classifying such waters as public and subject to appropriation are merely declaratory of the state of the law prior to such legislation and that except for any differences compelled by their subterranean character, such waters are affected with all the incidents of surface waters as to use, appropriation and administration.

Pecos Valley Artesian Conservancy Dist. v. Peters, 173 P.2d 490, 501 (N.M. 1945) (citing *Yeo v. Tweedy*, 286 P.

970, 974 (N.M. 1929)). See *State ex rel. Reynolds v. Mendenhall*, 362 P.2d 998, 1002 (N.M. 1961) (general law of appropriation applies equally to ground and surface water); *City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962) (substantive rights to surface and underground water identical).

The Special Master's Report does not adequately consider groundwater as a source of supply distinct from surface water. The Report at the beginning of its section IV recites Texas's allegation that New Mexico is allowing "pumping of groundwater that is hydrologically connected to the Rio Grande", *id.* at 187, and in section V twice recites the United States' allegation that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande", *id.* at 217, 232 (quoting portions of respective complaints). But what is the import of these allegations? The Report does not say. In neither section IV nor V does the Report discuss groundwater or rights thereto. The word "groundwater" does not even appear again in either section. In section V the Report mentions "seepage and return flows" in discussing federal reclamation projects. *Id.* at 232. Nowhere does the Report take on the crucial question of how use and administration of ground and surface water should be managed in an interconnected basin. As discussed in section II below, the Report misses an entire body of water law dealing with unified administration of water rights and never cites or discusses the McCarran Amendment or the Court's seminal federalism holdings in *Colorado River* and

California v. United States. The Report seems merely to assume that ground and surface water are the same resource, even though the LRG Adjudication found otherwise, as discussed below.

To be sure, NMSU does not dispute that use of hydrologically interconnected ground and surface water must be reconciled to protect senior appropriators and to comply with compact obligations. See *Kansas v. Nebraska*, __ U.S. __, 135 S. Ct. 1042, 1050 (2015) (to the extent Nebraska's groundwater pumping depleted stream flow in the basin, it counted against its annual allotment of water under the Republican River Compact). Nonetheless, available groundwater in storage is a precious resource that can and should be put to beneficial use. As discussed in section III below, New Mexico law provides for integrated or conjunctive use of ground and surface waters in order to make beneficial use of the State's scarce water resources.

Within the lower Rio Grande of New Mexico, the Mesilla Valley has substantial groundwater in storage that predates by many millennia either the Project or the Compact.[3] The saturated aquifer thickness of the

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[3] For a good discussion of the hydrogeology of the Mesilla groundwater basin, see: (1) Hawley, J.W., Kennedy, J.F. and Creel, B.J., 2001, The Mesilla Basin Aquifer System of New Mexico, West Texas, and Chihuahua – An Overview of Its Hydrogeologic Framework and Related Aspects of Groundwater Flow and Chemistry; in Mace, R.E., Mullican, W.F. III, and Angle, E.S. (eds.), Aquifers of Texas: Texas Water Development Board Report 356, pp. 76-99 ("*Texas Water Development Board Report 356*") at 91 (available: https://www.twdb.texas.gov/publications/reports/numbered_reports/

Mesilla Basin or "Bolson" varies up to a maximum of 3,000 feet in depth, with most-productive aquifer zones ranging in depth from 300 to 2,000 feet. *Texas Water Development Board Report 356* at 91. The aquifer extends across an area of 500 square miles and contains more than 60 million acre-feet of "recoverable fresh to moderately brackish groundwater in storage" mostly underlying the Mesilla Valley of New Mexico. *Brackish Groundwater Resource Development in New Mexico* (2016) at 3. The Mesilla Basin straddles the course of the ancestral Rio Grande before it shifted miles to the east to its current course. *Texas Water Development Board Report 356* at 92. The geologically youngest upper layer of the Mesilla Basin formed from sedimentary deposits near the end of the Late Pleistocene ice age, 15 to 30 thousand years ago. *Id.* at 91.

The Project did not appropriate and the Compact did not apportion this groundwater. In 2012, the LRG Adjudication court ruled that the Project right is a surface water right and does not include groundwater: "The points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to surface

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doc/R356/Chapter7.pdf); and (2) Hawley, J.W., Challenges and Opportunities for Brackish Groundwater Resource Development in New Mexico – Prediction Hydro-Science from an Octogenerian Hydrologist's Perspective; Urban Land Institute-New Mexico Section, April 28, 2016 (*"Brackish Groundwater Resource Development in New Mexico (2016)"*) (available: http://aquadoc.typepad.com/files/uli-nm_whitepaper.pdf).

water under New Mexico law for purposes of the adjudication." Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 4-6, LRG Adjudication (Aug. 16, 2012) ("2012 LRG Order"). Likewise, no provision of the Compact apportions groundwater. See *City of El Paso*, 563 F. Supp. at 387.

Conclusions in the Report that the State of New Mexico has lost control over water compacted to it, that state law no longer applies, and that non-Project water rights are by implication invalid without a federal contract, *id.* at 211-217, call upon this Court to cast aside prevailing law and practice and void vested and relied upon real property in the form of vital water rights. If the Report's view is correct, NMSU and all other institutions, communities, commerce and industries, and thousands of individual residences supplied with groundwater should have packed up in 1938 and left the Mesilla Valley. The City of Las Cruces should have moved somewhere else. But that thought never occurred to anyone. Because of economic enterprise and population growth, the Mesilla Valley has developed into a vibrant region and the State's second most populated. All non-agricultural water users and all farms with irrigation wells depend on groundwater. No one has ever told NMSU that in 1938 the Compact supplanted the University's water rights and that it must request a federal contract to continue using state groundwater. The University has substantial relationships with agencies and institutions of the

federal government and the State of Texas and not once has anyone from those entities asserted that the Compact invalidated NMSU's use of groundwater.

The State of New Mexico recognizes NMSU's pre-existing water right. In 2007 the court in the LRG Adjudication entered a consent order between NMSU and the State confirming a priority date of 1890 for the University's main campus groundwater right. Subfile Order, LRG Adjudication, Subfile No. LRN-28-014-0001 (Nov. 9, 2007). NMSU believes this right to be valid and not subject to curtailment because of shortages to subsequent surface water uses or because of any provision of the Compact. By the time Elephant Butte dam was constructed in 1916, NMSU had been using groundwater for a quarter century, and nearly a half century by 1938 when the Compact was adopted. This preexisting right should be protected. See *Colorado v. New Mexico*, 459 U.S. 176, 188 (1982) (finding in equitable apportionment context "equities supporting the protection of established, senior uses are substantial"). The Report's conclusion that Project supply "takes priority over all other appropriations granted by New Mexico[,]" *id.* at 213, would rob NMSU of its senior groundwater right.

Moreover, if the Report envisions a pristine, undeveloped agricultural valley in New Mexico, it does not explain why the same vision does not extend into Texas. Water users in El Paso County make extensive use of groundwater, and no one doubts that the laws of Texas recognize such rights. The course of conduct between Texas and New Mexico after the adoption of the

Compact demonstrates that both States understood the development of groundwater to be compatible with the terms of the Compact, so long as obligations to make surface deliveries were met. See *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010) ("the parties' course of performance under the Compact is highly significant"); *Tarrant Regional Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2135 (2013) (course of performance highly significant evidence of understanding of compact's terms). After ratification of the Compact, the Rio Grande Compact Commission adopted rules and regulations. *Rules and Regulations for Administration of the Rio Grande Compact* (Feb. 29, 1940) (NM Motion to Dismiss, App. 34). The preamble declared: "A Compact, known as the Rio Grande Compact, between the States of Colorado, New Mexico and Texas . . . which equitably apportions the waters of the Rio Grande above Fort Quitman and *permits each State to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact. . . .*" *Id.* at 1 (emphasis added). Since that time both States have made extensive development of their respective groundwater resources, in accordance with their respective state laws.

II. The Report overlooks state and federal laws that require unified adjudication and administration of water rights in accordance with state law.

The Report proposes to strip New Mexico of jurisdiction over surface water in favor of the U.S. Bureau of Reclamation, at 213-217. Under this line of thinking, a federal agency will administer surface water while the State continues to administer groundwater. Such an outcome would split the proverbial baby. It would contravene federal and state law requiring unified adjudication and administration of a shared resource and would create an unworkable regulatory scheme. It would trample on the State's rights, contrary to the "cooperative federalism" afforded to all Western States. *California v. United States*, 438 U.S. at 650-651 (citing Section 8 of the Reclamation Act of 1902).

By enactment of the McCarran Amendment, Congress expressly waived the United States' sovereign immunity to be joined as a party in comprehensive stream system adjudication suits and for the administration of such rights:

> Consent is given to join the United States as a defendant in any suit (1) for the *adjudication* of rights to the use of water of a river system or other source, or (2) for the *administration* of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law . . . and the United States is a necessary party to such suit. . . .

43 U.S.C. § 666(a) (emphasis added). In interpreting the McCarran Amendment to require deference to state court adjudication of federal water claims in the San Juan Basin of Colorado, this Court explained:

> The clear federal policy [e]vinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

Colorado River, 424 U.S. at 819 (citation omitted).

The Court also upheld the State of California's imposition of conditions on its approval of an appropriation to the United States from the Stanislaus River for impoundment in the New Melones Dam, part of the federal reclamation irrigation project serving California's central valley. *California v. United States*, 438 U.S. 645 (1978). In considering the United States' challenge to the State's conditions, the Court reviewed the long history of deference by federal statutes to state control over water resources: beginning with the Homestead Act of 1862, the Mining Act of 1866 and the

Desert Land Act of 1877, *id.* at 655-658; continuing to the Reclamation Act of 1902, *id.* at 663-674; and culminating with the McCarran Amendment in 1952, *id.* at 678. The Court summed up the federal-state relationship: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653. See *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-703 (1899) (territory of New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande upheld; the "Court unhesitatingly held that 'as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.'" (quoted in *California v. United States*, 438 U.S. at 662)).

In emphasizing federal deference to state authority over water, the Court in *California v. United States* adopted the rationale behind the McCarran Amendment. "Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666, which subjects the United States to state-court jurisdiction for general stream adjudications:"

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is

> to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . .
>
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Id. at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951)). See also *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law).

New Mexico's constitution and statutes assert control by the state over its waters. N.M. Const. art. XVI, § 3; N.M. Stat. Ann. 1978, Chapter 72. See *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957) ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. . . . The state as owner of water has the right to prescribe how it may be used."). In particular, the state water code confers supervision of the State's water on the State Engineer, N.M. Stat. Ann. Chapter 72, Article 2,

and authorizes and mandates adjudication of state waters under state law, *id.* N.M. Stat. Ann. §§ 72-4-14 through -19 (1907). Consistent with the McCarran Amendment, the State's adjudication statutes require a comprehensive and unified proceeding:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. . . . The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved. . . .

N.M. Stat. Ann. § 72-4-17 (1907). See *United States v. Bluewater-Toltec Irrig. Dist.*, 580 F.Supp. 1434, 1438 (D.N.M. 1984), affirmed, 806 F.2d 986 (10th Cir. 1986) (suit under New Mexico adjudication statutes satisfied McCarran Amendment's comprehensiveness requirement); *Colorado River*, 424 U.S. at 804 n. 2 (in context of satisfying McCarran Amendment requirement, noting that New Mexico statutes and other southwestern States have "elaborate procedures for allocation of water and adjudication of conflicting claims to that resource").

The Third Judicial court of New Mexico has entered its third decade adjudicating all water rights in

New Mexico's lower Rio Grande. Since ordering realignment of the State as plaintiff in 1996, the LRG Adjudication has made considerable progress: completing a basin-wide hydrographic survey of all water uses; joining more than 16,000 claimants; entering individual subfile orders; entering subfile orders of rights of public water users NMSU and the City of Las Cruces; and resolving major stream system issues, including a final decision on the United States' claims to the Rio Grande Project within New Mexico. Stream System Issue No. SS-97-104, 2012 LRG Order, Order Regarding Quantity (Feb. 17, 2014) and Findings of Fact and Conclusions of Law (granting U.S. claim of early priority date of 1903) (April 17, 2017) ("2017 LRG Order").

The New Mexico Court of Appeals and the Tenth Circuit have each rejected challenges by the United States to the state court's jurisdiction over the United States in the LRG Adjudication. In what is already a long and expensive process, NMSU and other parties were forced to defend the state court's right to conduct the adjudication. In 1990, the United States filed a motion seeking dismissal of the case asserting a single adjudication of the entire Rio Grande of New Mexico was necessary to meet the comprehensiveness requirement of the McCarran Amendment. In *Regents of New Mexico State University*, the New Mexico Court of Appeals upheld the district court's denial of the motion, finding the lower Rio Grande of New Mexico is a separate stream system in compliance with the McCarran Amendment and the state adjudication statutes. 849

P.2d at 378-379. The court underscored that "both statutes are intended to avoid piecemeal litigation by including all claimants to the water source." *Id.* at 379 (citing *Colorado River*, 424 U.S. at 819 and *State ex rel. Reynolds v. Lewis*, 545 P.2d 1014 (N.M. 1976)).

Similarly, the Tenth Circuit in *City of Las Cruces* rejected the United States' separate suit filed in U.S. district court of New Mexico to quiet title to its water rights in the Project. After concluding that New Mexico law applies to the determination of the federal claim in New Mexico, *id.* at 289 F.3d at 1176, 1186, the court upheld the federal district court's decision abstaining jurisdiction in favor of the ongoing LRG Adjudication. *Id.* 1191-92. The Tenth Circuit explained:

> There are thousands of water users in New Mexico who may assert a right to Project water just as New Mexico State University and Stahmann Farms have in this case. Their claims will be adjudicated in the comprehensive New Mexico stream adjudication. By declining jurisdiction, the district court avoided a piecemeal approach to adjudicating the rights of the United States vis-a-vis innumerable water users in New Mexico. The district court acted within its discretion in determining that the United States' claims against the named defendants and other water users would be better settled in a unified proceeding.

Id. at 1187. Noting the purpose of the McCarran Amendment to "adjudicate the interlocking rights of all users" in state court, the Tenth Circuit warned

"chaos could result in this case if the United States is permitted to litigate its claim in federal court." *Id.* at 1191. This is exactly what will happen in this original action if the United States (1) is allowed to assert claims here that belong, and have already been decided, in the LRG Adjudication or (2) is granted administration over surface water in the lower Rio Grande of New Mexico.

The Special Master's Report simply does not consider this significant body of law. It does not cite or discuss the McCarran Amendment, *California v. United States*, *Colorado River*, the New Mexico adjudication statutes or the *Regents of New Mexico State University*. It misses this well-developed and long-accepted body of law requiring deference to comprehensive state adjudication and administration of state waters. See *New Jersey v. New York*, 523 U.S. 767, 808-809 (1998) (accepted legal principles inform compact interpretation); *Tarrant*, 133 S. Ct. at 2132-33 (compact's silence does not mean signatories had "dispensed with the *core state prerogative* to control water within their own boundaries.") (emphasis added). Instead, after omitting this important pillar of western water law, the Report simply concludes that New Mexico "as a quasi-sovereign, relinquished its own rights" over its own compacted surface water, *id.* at 216, in favor of the U.S. Bureau of Reclamation, *id.* at 217, and that "New Mexico state law does not govern the distribution of water apportioned by Compact[,]" even to New Mexico. *Id.* at 216. The Report acknowledges that "it may seem

strange" that New Mexico has relinquished sovereignty over its own compacted water, but nevertheless plows ahead, citing as its only authorities for this astonishing proposition *Alamosa-La Jara v. Gould*, 674 P.2d 914 (Colo. 1984) (cited by the Report as *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*) at 214, 216, and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938), at 212, 213, 216. These two cases do not support the Report's conclusion. They support the opposite. Both cases stand for the principle that state laws govern the administration of intrastate waters.

Finally, if the Compact deprived New Mexico of sovereignty over its water, as the Report concludes, the Report does not explain how Texas retained jurisdiction over its waters within Texas. If Texas likewise committed its compacted water to the Project, then it stands to reason that Texas also relinquished its sovereignty over its compacted surface water within Texas. But the State of Texas does not think so, and rightfully continues to adjudicate and administer its water. See *In re: Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, Cause No. 2006-3219 (327th Dist. Ct. El Paso Cnty., Tex. 2006), *decree issued* Oct. 30, 2006 (adjudicating the Project right for the Texas portion). The Tenth Circuit described application of the respective States' laws this way: "The United States asserts title to Project

water under either New Mexico or Texas law, depending on which right is asserted. There is, however, no uncertainty over which state's laws applies to determine the United States' rights." *City of Las Cruces*, 289 F.3d at 1176. Within New Mexico, its state law mandates unified adjudication and administration over its water by its court and State Engineer, respectively. The state water code in no instance grants supervisory authority to the federal government.

III. In order to make beneficial use of its groundwater, New Mexico conjunctively administers ground and surface water.

In the pivotal New Mexico case of *City of Albuquerque v. Reynolds*, the New Mexico Supreme Court considered the interrelationship between ground and surface water. 379 P.2d 73 (N.M. 1962). Along the Rio Grande where ground and surface water are interrelated, the court held that New Mexico law requires the administration of ground and surface water rights conjunctively to protect senior rights as required by the State's prior appropriation doctrine. *Id.* at 79-81. Thus, the court upheld the State Engineer's permit granting Albuquerque a new appropriation of groundwater conditioned on not impairing prior existing water rights. *Id.* at 81. To avoid impairment, the permit required the City to secure surface water rights or demonstrate return flows to the Rio Grande sufficient to offset pumping effects of the new groundwater appropriations on surface flows. *Id.* 71, 78.

Historically in New Mexico, appropriations of surface water occurred in large quantities before advances in technology allowed high volume groundwater wells. See Ira G. Clark, *Water in New Mexico, A History of its Management and Use*, University of New Mexico Press (1987), Chapter 14, "Groundwater in Ascendency" at 240-242. Nonetheless, State Engineer records reveal many examples of early groundwater wells drilled prior to subsequent surface appropriations. See, e.g., Albuquerque Electric Company (now Public Service Company of New Mexico), OSE License No. RG-50 (priority date 1903); University of New Mexico, OSE File No. RG-551 (priority date 1904); Roswell-Artesia area (priority dates 1891, 1903), *Water Matters!*, Chapter 16 "Groundwater in New Mexico" (2013), Utton Center, University of New Mexico Law School, at 16-1, (available: http://uttoncenter.unm.edu/pdfs/WaterMatters2013/Groundwater%20in%20NM%20.pdf). With a priority date of 1890 for its main campus groundwater right, NMSU owns and relies on a water right that predates most other priority dates in the Mesilla Valley including surface water priorities. In such instances of early groundwater development, the hydrologic effects of senior groundwater pumping on surface flows do not constitute impairment of later surface appropriations because, as *Albuquerque v. Reynolds* explained, "[p]riority of appropriation shall give the better right[,]" whether the source is surface water or groundwater. 379 P.2d at 82 (quoting art. XVI, § 2, Constitution of New Mexico). In *Albuquerque v. Reynolds* the court contrasted the City's application for a new appropriation with the City's historical rights, the exercise of

which does not require offset of effects on surface water. *Id.* at 76, 83. See *Mendenhall*, 362 P.2d 998, 1003 (groundwater statute's requirement of State Engineer permit for new groundwater appropriations did not apply to prior existing groundwater rights; "'existing * * * rights based upon application to beneficial use' were 'recognized' and the provisions of the statute were not intended to 'impair' or 'disturb the priorities thereof.'" (quoting section now codified as N.M. Stat. Ann. § 72-12-4)).

Albuquerque v. Reynolds demonstrates further that, even where appropriable surface water may be fully spoken for, it may be both lawful and desirable to permit new appropriations of interrelated groundwater as a means of fully utilizing the State's water resources. The case directly addressed the circumstance, as in the lower Rio Grande, where an underground basin contains substantial unappropriated groundwater in storage but the connected surface body is fully appropriated. The State Engineer found:

> * * * The scientific considerations discussed hereinabove show clearly that accretions from the underground reservoir constitute a major source of the fully appropriated surface water supply of the Rio Grande. These considerations also show that over a 75-year period about one-half of the water proposed to be taken would be extracted from surface flows and about one-half would be taken from underground storage. Much of the water in storage in the Rio Grande underground reservoir

> is unappropriated and may be taken for beneficial use under an application properly formed to insure against the impairment of existing surface water rights.

379 P.2d at 78. Because groundwater pumping takes part, and in some instances all, of its supply from water in underground storage, pumping may not diminish stream flow at a 1-to-1 ratio, as this Court recognized in *Kansas v. Nebraska*, 135 S. Ct. at n.1, 1060 ("In other words, a State can pump a bucketful of groundwater without reducing stream flow by the same amount.").

In granting a new application to Albuquerque conditioned on return flows and retirement of surface rights sufficient to offset effects on the Rio Grande, the State Engineer explained: "Under proper application the appropriator may take advantage of ground water that can be removed from storage without impairment of existing rights[.]" *Id.* In upholding this conjunctive approach, the New Mexico Supreme Court reasoned:

> If we assume, as we must, from the findings made by the state engineer and also by the district court that the underground waters in question cannot be taken without impairment to the rights of the river appropriators, even though there are unappropriated underground waters in the basin, then it would seem to follow that some method should be devised, if possible, whereby the available unappropriated water can be put to beneficial use.

Id. at 80-81.

Permitting development of available groundwater, while protecting prior existing rights, promotes beneficial use of the State's public waters. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. See *Kaiser Steel Corp. v. W. S. Ranch Co.*, 467 P.2d 986, 989 (N.M. 1970) ("Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for *maximum benefits* is a requirement second to none, not only for progress, but for survival." (emphasis added)); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34 (10th Cir. 1981) (utilization for maximum benefits is a requirement second to none in determining whether water is being used for a beneficial use under New Mexico's permit system of prior appropriation) (citing N.M. Stat. Ann. § 72-1-2 and N.M. Const. art. XVI, § 3).

The State's law and practice governing the conjunctive use of ground and surface water apply to the State's lower Rio Grande. After the State Engineer declared the Lower Rio Grande Basin in 1980, applicants could still legally appropriate available groundwater but subject to a permit condition of offsetting effects on the Rio Grande. As set forth in the State's current administrative rules governing the Mesilla Valley Administrative Area ("MVAA"), "[t]he State Engineer has developed administrative criteria in order to assure the orderly development of water resources within the MVAA, while meeting statutory obligations regarding non-impairment of existing water rights. . . ." MVAA

Guidelines for Review of Water Right Applications (Jan. 5, 1999) at 2 (available: http://www.ose.state.nm.us/RulesRegs/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf). Except for *de minimis* uses, the rules provide that permitted groundwater appropriations "must offset 100% of the surface water depletions caused by the appropriation." *Id.* at 4. Although the LRG Adjudication ruled that the Project does not have a groundwater right, the court recognized the conjunctive administration of ground and surface water under New Mexico law: "the United States may pursue any administrative action available under New Mexico law to protect its right from other appropriations, pending or existing, that encroach upon its right." 2012 LRG Order at 4. As the U.S. District Court found in *City of El Paso*, although Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply," this did not preclude the New Mexico State Engineer from "conjunctively manag[ing] the surface and ground water in the Lower Rio Grande System." 563 F. Supp. at 387.

The New Mexico Legislature has specifically found that "compliance with interstate compacts is imperative" and therefore granted authority to the State Engineer to administer water rights where, as in the lower Rio Grande, a final adjudication has not been completed and administration of water rights may be required. N.M. Stat. Ann. § 72-2-9.1 (2003). That authority was confirmed by the New Mexico Supreme Court in *Tri-State Generation & Transmission Ass'n,*

Inc. v. D'Antonio, 289 P.3d 1232, 1235 (N.M. 2012). Pursuant to the legislative grant, the State Engineer promulgated regulations requiring Active Water Resource Management, *id.*, and has identified the lower Rio Grande as a priority area in order to comply with the Compact and protect senior appropriators. In the event any senior appropriator claims impairment by a junior, New Mexico law and administration are fully equipped to evaluate the claim and afford relief. By administering ground and surface water rights together, New Mexico has allowed development of groundwater consistent with state law and the Compact.

The Report's conclusion that New Mexico relinquished sovereignty over surface water would create a disjointed and unworkable administrative scheme. By ignoring administration of groundwater the Report fails to consider the consequent split of administration of the interconnected resource: the U.S. Bureau of Reclamation takes over administration of New Mexico's surface water and the state continues to administer groundwater. Such a split is legally and practically untenable. "A principal motivating factor behind Congress' decision to defer to state law was thus *the legal confusion that would arise if federal law and state water law reigned side by side in the same locality*." *California v. United States*, 438 U.S. at 668-669 (emphasis added).

IV. The United States has repeatedly sought to avoid state authority over its water claims in the lower Rio Grande of New Mexico and should not be permitted to make claims under reclamation law in this Court that properly belong in the state forum.

The Special Master's Report recommends the Court grant New Mexico's motion to dismiss the United States' Complaint in Intervention because "the United States cannot state a plausible claim under the 1938 Compact" but then recommends the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) "to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Rio Grande Project . . . to allow for the resolution by the Court of the United States' project claims to occur simultaneously with the resolution of Texas's compact claims against New Mexico." Report at 237. The Report reasons that resolution of the United States' claims by the Court is "desirable due to the interstate nature of the Rio Grande Project." *Id.* at 234.

NMSU does not contest the Report's recommendation to hear the United States' claims, so long as those claims are necessary for resolution of the compact claims in this case. This Court, however, should not agree to hear claims that duplicate federal claims already before the LRG Adjudication court or to grant relief already within the administrative authority of the State of New Mexico. Despite the "interstate nature of the Rio Grande Project", *id.* at 234, the United

States' complaint targets activity entirely within the State of New Mexico. See Compl. in Intervention, ¶ 13 ("New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts. . . ."). It appears to NMSU that the United States' claims are for the most part a repackaging of its intrastate claims, and even if this Court accepts jurisdiction to hear the claims it should ultimately defer or abstain in favor of the ongoing judicial proceedings and existing administrative procedures in New Mexico. This Court should be "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum." *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

The state court and the parties have worked for more than 25 years to position the LRG Adjudication to determine stream system issues, in particular the United States' interests in the Project in New Mexico. Earlier this year the LRG Adjudication completed adjudication of those interests in Stream System Issue No. SS-97-104. The United States, however, has repeatedly resisted the state court's authority. From the inception of the LRG Adjudication in 1986, the United States fought jurisdiction in state court, first by filing a motion to dismiss for lack of jurisdiction under the McCarran Amendment and then later by filing a second motion re-arguing that the lower Rio Grande in New Mexico does not constitute a "river system," as

required by McCarran. The district court denied the motions and the United States appealed. As discussed above in section II, the New Mexico Court of Appeals upheld the district court's decision in *Regents of New Mexico State University*, 849 P.2d 372 (Ct. App. 1993).

In 1996, the State Engineer undertook a comprehensive hydrographic survey of the basin in order to move forward with adjudication of all water rights claims. In 1997, the United States sued seven parties, including NMSU, in the U.S. District Court of New Mexico seeking to quiet title in itself to virtually all waters of the Project. See *United States v. Elephant Butte Irrigation District, et al.*, Cause No. 97-0803 JP/RLP (D.N.M.), Complaint filed June 12, 1997. The federal suit resulted in a five-year delay. NMSU and other defendants succeeded in moving the federal district court to abstain from hearing the United States' claims, in deference to the state court proceedings, under the federal abstention doctrine. In applying the factor-test under the abstention doctrine, the federal district judge observed:

> I am concerned that the United States may be using this case for "procedural fencing." Since the inception of the state adjudication, the United States has attempted to avoid the jurisdiction of the state court on several occasions. . . . I find it significant that the United States filed this federal court action shortly after losing on the issue of jurisdiction the last time in state court.

Memorandum, Opinion and Order, Aug. 22, 2000, at 24-25. Upon appeal by the United States to the Tenth Circuit, NMSU and other defendants prevailed in sustaining the federal district court's holding. *City of Las Cruces*, 289 F.3d 1170. The Tenth Circuit firmly rebuffed the United States' attempt to circumvent the authority of the state court, similarly observing:

> The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction. . . . After an extended period of pleadings and dismissal motions in the New Mexico proceedings and after realignment, the New Mexico stream adjudication is progressing rapidly. In the three years since the realignment and the denial of the State Engineer's last motion to dismiss, the parties have been cooperating; none have questioned the state court's jurisdiction. Only the United States and Texas parties still resist the stream adjudication.

Id. at 1189-1190.

After rejection by the Tenth Circuit of the federal quiet title suit in 2002, the state court developed exhaustive case management orders and directed the State to join and serve with offers of judgment the many thousands of claimants. When it became clear that the process of serving individual offers of judgment would take many years, the court ordered the State to join all claimants, even if separate offers of judgment would have to be served separately later.

Consequently, the State spent two years and significant resources to join more than 16,000 claimants as parties to the LRG Adjudication so that binding proceedings on basin-wide or stream system issues could go forward. The Court then began designating a number of Stream System Issues for resolution. By Order entered January 8, 2010, the court designated the interests of the United States in the Project as Stream System Issue No. 104, to be adjudicated by expedited *inter se* proceeding. Order Designating Stream System Issue/Expedited *Inter Se* Proceeding No. 104 (Jan. 8, 2010). After ruling against the United States that the source of supply for the Project did not include groundwater, 2012 LRG Order, the court recently ruled in favor of the United States' claimed priority date. 2017 LRG Order (granting U.S. claim of early priority date of 1903). The LRG Adjudication has now completed determination of the United States' interests in the Project within New Mexico.

In spite of completion of adjudication of the United States' claims, it appears the United States is taking advantage of the instant proceeding to avoid the State of New Mexico's jurisdiction once again. As the Report observes:

> . . . the crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its ability to

> deliver Project water to its consumers as required by contract or by convention.

Report at 219-220 (citing U.S. Complaint in Intervention, ¶¶ 13-15). As the Report also observes: " . . . resolution of an entirely intrastate issue was appropriately resolved under that State's law by the State Engineer." *Id.* at 235 (making comparison to Klamath Project). Yet the Report recommends the Court hear these intrastate claims "for purposes of judicial economy", noting "Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues." *Id.* at 234.

The opposite is true. Allowing the United States to re-assert "claims under federal reclamation law on behalf of the Rio Grande Project", Report at 237, would simply allow for re-litigation of claims the Tenth Circuit in *Las Cruces* decided 15 years ago should be determined in the state court and which now the LRG Adjudication has fully adjudicated. It is not possible for resolution of the federal claims in New Mexico to "occur simultaneously with the resolution of Texas's compact claims against New Mexico", *id.* at 237, because the former have already been resolved. To attempt otherwise would cause the very piecemeal litigation the Court warned against in *Colorado River* and would deny thousands of other claimants not joined in this original action the opportunity to contest a competing right.

CONCLUSION

NMSU respectfully asks the Court to reject the Report's reasoning that New Mexico relinquished control over its own groundwater and implicitly that New Mexico groundwater rights are invalid, and specifically reject conclusions that: (1) the water committed to New Mexico by the 1938 Compact "is not subject to appropriation or distribution under New Mexico state law[,]" *id.* at 211; (2) water committed to the Rio Grande Project for use in New Mexico "takes priority over all other appropriations granted by New Mexico[,]" *id.* at 213; (3) "New Mexico itself, as a quasi-sovereign, relinquished its own rights to the water it delivers in Elephant Butte Reservoir. . . . New Mexico state law does not govern the distribution of the water apportioned by Compact[,]" *id.* at 216; and (4) "Therefore, New Mexico . . . is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact . . . requires the water at that point be controlled and delivered to its destinations by Reclamation." *Id.* at 217. Therefore, the Court should not hold that any groundwater user in New Mexico's lower Rio Grande must obtain a permit from or contract with Reclamation. See Report at 232. Finally, NMSU asks the Court to refrain from hearing the Unites States' reclamation claims and to hear only federal claims

necessary for resolution of the Compact claims in this original action.

Respectfully submitted,

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Exceptions To The Special Master's Report

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS REGARDING THE FIRST INTERIM REPORT OF THE SPECIAL MASTER AND IN SUPPORT OF CERTAIN EXCEPTIONS OF THE UNITED STATES

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BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS REGARDING THE FIRST INTERIM REPORT OF THE SPECIAL MASTER AND IN SUPPORT OF CERTAIN EXCEPTIONS OF THE UNITED STATES

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID" or "the District"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas' reply to exceptions regarding the First Interim Report of the Special Master and certain of the exceptions filed by the United States to the Report, pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

In this Original Action, the State of Texas seeks to enforce against the State of New Mexico the terms of the Rio Grande Compact ("Compact"), signed by the States of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress pursuant to the Act of May 31, 1939, 76 Pub. L. No. 96, ch. 155, 53 Stat. 785. Subsequent to Texas' filing of its Motion for Leave to File Complaint on January 8, 2013, the United States

[1] EPCWID files this brief pursuant to Supreme Court Rule 37.4. Notice to counsel of record for all parties was provided pursuant to Rule 37.2(a).

moved to intervene and file a Complaint in Intervention. The Complaint in Intervention seeks to require New Mexico to comply with its obligations under the Compact as it relates to the Rio Grande Reclamation Project ("Rio Grande Project" or "Project"), an interstate United States Bureau of Reclamation project which provides Texas its Rio Grande Compact entitlement. On January 27, 2014, the Court granted Texas leave to file its Complaint ("Texas Complaint"), with the right of New Mexico to file a motion to dismiss. On March 31, 2014, the Court granted the United States' Motion to Intervene and allowed the filing of the United States Complaint in Intervention ("U.S. Complaint"). New Mexico filed a motion to dismiss both the Texas Complaint and the U.S. Complaint on April 30, 2014. The Court referred New Mexico's motion to dismiss to Special Master A. Gregory Grimsal for resolution. The Court subsequently referred to the Special Master two motions to intervene, including that filed by EPCWID.

On March 20, 2017, the Court received and ordered filed the First Interim Report of the Special Master ("Report"), which recommends denial of New Mexico's motion to dismiss the Texas Complaint and denial in part of New Mexico's motion to dismiss the U.S. Complaint.[2] Regarding New Mexico's motion to

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[2] The Special Master recommends denial of the motions to intervene of Elephant Butte Irrigation District ("EBID") and EPCWID. This brief does not address the Special Master's recommendations on the motions to intervene. As Colorado notes, consideration of the United States' claims will require the participation of EPCWID and EBID. State of Colorado's Exceptions to

dismiss the Texas Complaint, the Special Master properly finds that "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact," Report 217; that the Rio Grande Project forms the basis for Texas' Compact rights, *e.g.*, Report 203-09; that New Mexico's delivery obligation into Elephant Butte Reservoir requires New Mexico to relinquish dominion and control of delivered water, Report 195-98; that New Mexico may not evade its Compact obligations by delivering water into Elephant Butte Reservoir and then allowing the depletion of that water upon release for non-Project water uses in New Mexico, Report 200-02; that because water delivered to the Project is Compact water, federal, not state, law applies to releases, delivery, and protection of Project water supply, Report 216-17; and that New Mexico lacks jurisdiction over Project water supply which includes Texas' Compact apportionment, Report 216.

Regarding the U.S. Complaint, the Special Master concludes, although the Rio Grande Project serves as the sole method of apportionment of Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir, the United States did not state a Compact claim because it is not a party to the Compact and the Compact makes no specific apportionment of water to the United States. Report 231. The Special Master

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the First Interim Report of the Special Master 9. EPCWID intends to actively participate in these proceedings as an *amicus curiae*, as specifically contemplated by the Special Master, Report 278, and reserves the right to renew its motion to intervene as the case develops.

concludes the United States did state claims under federal Reclamation law, and that because of the interrelationship of the Compact and Project, such claims should be decided together with the Texas Compact claims through this Court's exercise of its jurisdiction under 28 U.S.C. § 1251(b)(2). Report 237.

No party takes exception to the Special Master's recommendation that New Mexico's motion to dismiss the Texas Complaint be denied, that Texas has stated claims for New Mexico's violations of the Compact, and that the case should proceed before the Special Master to determine the specific nature and extent of those violations. Instead, New Mexico and Colorado, while agreeing the Texas Complaint should proceed, take exception to specific portions of the Special Master's rationale supporting the Report's recommendations. State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support ("New Mexico Brief") 16; State of Colorado's Exceptions to the First Interim Report of the Special Master ("Colorado Brief") 9. Four *amici curiae*, New Mexico State University ("NMSU"), New Mexico Pecan Growers ("NMPG"), City of Las Cruces, and Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), filed exceptions ostensibly in support of New Mexico (collectively "New Mexico *amici*"), arguing the Special Master's rationale should be rejected and that the Special Master failed to sufficiently consider additional issues in arriving at his recommendation. Motion for Leave to File and Brief of *Amicus Curiae* New Mexico State University in Support of Defendant

State of New Mexico ("NMSU Brief"); Motion for Leave to File and Brief of *Amicus Curiae* New Mexico Pecan Growers in Support of Defendant State of New Mexico ("NMPG Brief"); City of Las Cruces' *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master ("Las Cruces Brief"); and Albuquerque Bernalillo County Water Utility Authority's *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master ("ABCWUA Brief"). The Court should reject the exceptions filed by New Mexico, Colorado, and the New Mexico *amici*, adopt the Report of the Special Master with regard to denial of the motion to dismiss the Texas Complaint, and remand this case to the Special Master for proceedings on the Texas Complaint consistent with the Report.

EPCWID supports, with limitations as discussed herein, the Exception of the United States and Brief for the United States in Support of Exception ("U.S. Brief"). With regard to the U.S. Complaint, the Court should adopt the Report of the Special Master that the U.S. Complaint be allowed as to claims under Reclamation law, reject the recommendation of the Special Master that the U.S. Complaint failed to state a claim under the Compact, and direct all claims of the U.S. Complaint to be heard by the Special Master.

INTEREST OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

The case brought to this Court by Texas and the United States is vital to protect and preserve the water supply of EPCWID, the Texas beneficiary of the Rio Grande Project and the recipient of Texas' Rio Grande Compact apportionment. New Mexico's continuing Compact violations, set forth in both the Texas Complaint and the U.S. Complaint, directly affect the Project water supply to which EPCWID is entitled.

EPCWID has submitted two prior *amicus curiae* briefs in this action, Brief of *Amicus Curiae* El Paso County Water Improvement District No. 1 in support of State of Texas' Motion to File Complaint (March 11, 2013) ("EPCWID Motion to File Complaint Brief"), and Brief of *Amicus Curiae* El Paso County Water Improvement District No. 1 in support of State of Texas and United States in Opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States Complaint in Intervention (June 16, 2014). As set forth in those briefs and herein, EPCWID is one of two beneficiaries of the Rio Grande Project, the cornerstone of the Rio Grande Compact and the vehicle through which Texas, through delivery to EPCWID, receives its Compact apportionment.[3]

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[3] The Special Master recognized the benefit of allowing both EBID and EPCWID to participate as *amicus curiae* in light of their respective unique capacities as beneficiaries of the Rio Grande Project. Report 267, 277-78.

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. art. XVI, § 59(b); *see El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (stating EPCWID is a Texas political subdivision and "is fashioned to perform public service and duties of high importance to the welfare of the people of Texas"). EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. The District provides water for irrigation and municipal uses (pursuant to contracts approved by the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID classified as irrigable. EPCWID provides, on average, over fifty percent of the annual water supply of the City of El Paso from the District's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Compact, and allocated to the District through the Project.

The Rio Grande Project was authorized by Congress in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas (collectively "the Districts"), and, pursuant to international treaty, to Mexico. *See* Act of Feb.

25, 1905, 58 Pub. L. No. 104, ch. 798, 33 Stat. 814 ("Rio Grande Project Act") (extending the Reclamation Act of 1902, 57 Pub. L. No. 161, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas, and authorizing the construction of Elephant Butte Dam to provide water for irrigation in Texas and New Mexico); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906). The Rio Grande Compact was designed to ensure the Project remained viable by requiring New Mexico's Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become "usable" water for the Project, Rio Grande Compact Art. I(*l*), to be allocated and delivered to the Project beneficiaries, EBID and EPCWID. Neither the Compact nor the Project allowed for or contemplated the diminishment of delivered usable Project water below Elephant Butte by New Mexico for non-Project water uses.

EPCWID provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. *See* Tex. Water Code § 55.185 (authorizing EPCWID to enter into contracts with the Bureau of Reclamation). These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project. EPCWID has a February 16, 1938 contract with EBID, approved by the United States which provides, in part, that 67/155th of the Rio Grande Project water is to be

distributed to EPCWID, and 88/155th to EBID.[4] This contract was signed a month prior to the March 18, 1938 Rio Grande Compact as a necessary precursor to the Compact. EPCWID has reimbursed the United States for EPCWID's share of the United States' reimbursable Project construction costs and now holds title to most of the Project works within its boundaries. *See* Act of Oct. 30, 1992, Pub. L. No. 102-575, § 3301, 106 Stat. 4600, 4705-06 ("Title Transfer"). EPCWID was decreed a water right in the State of Texas for its water supply from the Project which it holds jointly with the United States. *See In re: Adjudication of all Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Tex.) Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex., Oct. 30, 2006) (as set forth in Texas Commission on Environmental Quality Certificate of Adjudication No. 23-5940 (March 7, 2007) ("Certificate of Adjudication")).[5]

In 2007, EPCWID filed suit in the Western District of Texas, against EBID and the Bureau of Reclamation, to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. Jan. 22, 2007). EPCWID requested the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project

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[4] The contract is reprinted in the appendix to the Brief for the United States as Amicus Curiae (Dec. 10, 2013).

[5] The Certificate of Adjudication is reprinted in the appendix to the EPCWID Motion to File Complaint Brief.

water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement in 2008 that included an operating agreement for the Project ("Operating Agreement").[6] The Operating Agreement establishes a method for the allocation of water among EBID, EPCWID, and Mexico, and provides mechanisms for coordination among the Districts and Reclamation with regard to Project operations. Pursuant to the Operating Agreement, the Districts participate in the operation of the Project through coordination with Reclamation regarding allocation, release, distribution, and delivery of the Project water supply essential to both districts. New Mexico's violations of the Rio Grande Compact, by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and New Mexico's interference with the operation of the Project by the United States has, and will continue to have, detrimental effects on the continued viability of the Rio Grande Project and the Operating Agreement.

SUMMARY OF ARGUMENT

The Court should adopt the Report in full as it relates to New Mexico's motion to dismiss the Texas Complaint. New Mexico, Colorado, and the New

[6] The Operating Agreement is available at https://www.usbr.gov/uc/albuq/rm/RGP/pdfs/Operating-Agreement2008.pdf.

Mexico *amici* do not take exception to the Special Master's recommendation that New Mexico's motion to dismiss should be denied and that this case should proceed before the Special Master on Texas' Complaint. Rather, they argue the Court should ignore the Special Master's conclusions and determinations which support the recommendations. The Court should reject this approach as procedurally infirm and legally unsupported. Additionally, the Court should reject the arguments of New Mexico and New Mexico *amici* that the New Mexico general stream adjudication is an adequate forum to resolve the intertwined Compact and Project claims of Texas and the United States. This Court has exclusive jurisdiction to determine those claims. Finally, the Court should disregard the erroneous statements of New Mexico and its *amici* regarding the Operating Agreement, a binding agreement among the United States, EPCWID, and EBID which provides a sound basis under which EPCWID receives its appropriate allocation of Project water supply despite New Mexico's continuing Compact violations.

With regard to the Special Master's recommendation on New Mexico's motion to dismiss the U.S. Complaint, the Report correctly concludes that the United States' claims based on Reclamation law should be determined with the claims of Texas regarding violations of the Rio Grande Compact. However, the U.S. Complaint also states claims for Compact violations based on the interrelation of the Compact and the Rio Grande Project, and the obligation of the United States to effectuate delivery of Texas' Compact water to

EPCWID. While the United States is not apportioned a specific amount of water under the Compact, the Project's allocation to EPCWID serves as Texas' Compact apportionment, and thus the United States properly asserts claims against New Mexico for Compact violations which interfere with the United States' operation of the Project, for the benefit of and in cooperation with EPCWID and EBID, in accordance with the Operating Agreement.

ARGUMENT

1. The Court should reject the arguments of New Mexico, Colorado, and New Mexico *amici* that the Court selectively disregard the Special Master's rationale supporting his recommendation to deny New Mexico's motion to dismiss the Texas Complaint.

a. The Parties accede to the Special Master's recommendation and the requests to disregard the conclusions underlying the recommendation are procedurally infirm.

The Special Master properly concludes that Texas has stated claims under the Rio Grande Compact. In so concluding, the Special Master soundly rejects New Mexico's argument that New Mexico has no Compact obligations once it delivers water into Elephant Butte Reservoir: "it is unfathomable to accept that Texas 'would trade away its right to the Court's equitable

apportionment' had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas, upon its immediate release from the Reservoir." Report 209 (quoting *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015)). New Mexico unequivocally states it "accedes to the recommendation of the Special Master that its Motion to Dismiss the Texas Complaint be denied" and that it "recognizes that the case will move forward to resolve claims among Texas, New Mexico, and the United States," New Mexico Exceptions 1, but at the same time argues for rejection of the fundamental underpinnings of the Report which support denial of New Mexico's motion to dismiss the Texas Complaint.[7]

The Special Master's recommendation to deny New Mexico's motion to dismiss the Texas Complaint, as well as the rationale and conclusions underlying that recommendation, should be adopted by the Court. Contrary to the protestations of New Mexico and New Mexico *amici*, the Special Master made no findings and drew no conclusions other than those necessary to determine the motion to dismiss.[8] The Special Master's

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[7] New Mexico's *amicus* City of Las Cruces argues that the Report "exceeds the scope of [Fed. R. Civ. P.] 12(b)(6)." Las Cruces Brief 15. This argument is meritless because, in original actions, the Supreme Court, and the Special Master, are not confined by the Federal Rules of Civil Procedure. The *form* of motions is required to conform to the Federal Rules of Civil Procedure, Sup. Ct. R. 17.2, but beyond that, the Rules serve only as "guides," *id.*

[8] Ironically, it was New Mexico which put before the Special Master on its motion to dismiss hundreds of pages and a myriad

legal rationale and factual conclusions cannot be separated from his recommendation that New Mexico's motion to dismiss the Texas Complaint be denied. To the extent there are concerns with regard to the specifics of the Special Master's conclusions, the remedy is not for this Court to reject the Special Master's Report. Rather, any concerns or questions regarding the import of the conclusions underlying the Report's recommendation should be addressed by the Special Master as this matter proceeds before him, as all parties now agree it should.

Colorado, like New Mexico, agrees that the recommendation of the Special Master denying the motion to dismiss the Texas Complaint should be adopted by the Court. Colorado Brief 2. However, Colorado, like New Mexico, urges the Court not to adopt the underlying rationale which supports the Special Master's conclusions. The conclusions of the Special Master relate to a threshold determination regarding the motion to dismiss, in which New Mexico argued that Texas had failed to state a claim under the Compact and provided extensive (albeit unsupportable) rationale for why no claim was stated. The Special Master properly rejects New Mexico's position and in so doing provides the underlying rationale for his determination. The Court should adopt the Report in its entirety with regard to the denial of New Mexico's motion to dismiss the Texas

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of citations to historical and other information relating to the Compact and the Project. *See, e.g.*, New Mexico's brief in support of its motion to dismiss (April 30, 2014), App. 1-44, and lodging request by New Mexico (May 8, 2014).

Complaint and remand the case to the Special Master for further proceedings consistent with that Report.

b. New Mexico has no jurisdiction over Compact water delivered into Elephant Butte, which becomes water dedicated to the Project for release and delivery to EPCWID, EBID, and Mexico.

New Mexico now agrees that the Court should allow the case to proceed before the Special Master. Yet, New Mexico continues to reargue the legal issues presented in support of its motion to dismiss, which were fully considered and rejected by the Special Master. Specifically, New Mexico continues to dispute that Texas has stated a Compact claim, because the Compact requires New Mexico to deliver water into Elephant Butte Reservoir and thereby relinquish control of that water to the Project for delivery to EBID and EPCWID. New Mexico Brief 16, 31. Despite its concession that Texas states a Compact claim and that the matter should proceed before the Special Master, New Mexico continues to argue it should be allowed to deliver water under the Compact and then retrieve that water upon release from Elephant Butte dam. *See, e.g.*, New Mexico Brief 19. New Mexico simply has reformulated its untenable position which the Special Master rejected as "unfathomable." Report 209.

Contrary to New Mexico's arguments, neither the Special Master's recommendation that the motion to dismiss the Texas Complaint be denied, nor his

underlying rationale "strips New Mexico of its sovereign authority over water within the State" or conflicts with Section 8 of the Reclamation Act, 43 U.S.C. § 383, or any other aspect of federal or state law. New Mexico Brief 16, 23. These arguments, as well as New Mexico's argument that the Special Master's recommendation unlawfully deprives New Mexico of jurisdiction over the water apportioned under the Compact, ignore the fundamental and correct premise that the Compact water New Mexico delivers into Elephant Butte is thereafter committed to the Rio Grande Project (EBID and EPCWID), and not available to New Mexico water users. *See* Compact Art. I(*l*) (defining usable water).

The Special Master properly concluded that New Mexico lacks jurisdiction to allocate or administer the waters below Elephant Butte in a manner which allows New Mexico to determine what share of Project water goes to Texas and therefore to EPCWID. New Mexico appears to argue that when it signed the Rio Grande Compact, it retained jurisdiction within the Project and below Elephant Butte to not only allocate and administer rights in New Mexico, if any, which may be allowed by the Compact, but to decide, in its estimation and judgment, the quantity of water to which Texas is entitled under the Compact. New Mexico seeks of the Court the imposition of a legal regime akin to the fox watching the hen house, and this ongoing stance by New Mexico is exactly why Texas invoked this Court's original jurisdiction to enforce the terms of the Rio Grande Compact. After execution of the Compact, New Mexico was not left with jurisdiction or

sovereignty to determine what Texas receives under the Compact. Under the plain terms of the Compact, that is the function of the Project, now determined through the Operating Agreement.

It is not a novel proposition that subsequent to apportionment of an interstate stream, one state does not determine as an intrastate matter what amount of water the downstream compacting state is permitted to receive. *See Kansas v. Nebraska*, 527 U.S. 1020 (1999) (compact can restrict intrastate consumptive use of state water resources); *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (compacting state can assert claim to restrict intrastate use of water); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (rights of state water uses subordinated to compact obligations). New Mexico's effort to claim control of Project water, and adjudicate and administer Project water under state law, is unavailing. Project waters are dedicated to the Compact and the rights and obligations of New Mexico, Texas, and the United States must be determined in this Court pursuant to federal law.

c. The Report is consistent with state and federal law including Section 8 of the Reclamation Act.

The Special Master's sound conclusions with regard to the meaning and functioning of the Rio Grande Compact and the Rio Grande Project do not conflict with Section 8 of the Reclamation Act of 1902. New

Mexico's and New Mexico *amici*'s reliance on Section 8 as a basis to disregard the Special Master's legal conclusions is flawed because it ignores the significant jurisprudence that directs state law applies to federal Reclamation projects only to the extent state law is not inconsistent with federal law or does not otherwise thwart other federal purposes. *See California v. United States*, 438 U.S. 645, 662 (1978); *Arizona v. California*, 373 U.S. 546, 587-88 (1963) (states may do nothing inconsistent with the Project Act or with federal control of the river). It is also clear that federal, not state, law applies to the determination of the rights and obligations of the United States in Reclamation project contracts. *See Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1147 (10th Cir. 2009) (obligations and rights of the United States under its contracts governed exclusively by federal law); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1361-62 (Fed. Cir. 2009) (United States obligated to make deliveries under the terms of federal Reclamation contracts). Here, the Compact directs New Mexico to deliver Texas' Rio Grande Compact water to the Project, which becomes usable Project water supply. Compact, Art. I(*l*). That water does not thereafter lose its character as Compact water destined for Texas and its disposition is governed by federal, not state, law. New Mexico's efforts to assert jurisdiction over Project water dedicated to Texas under the Compact would thwart the federal purpose of the Project and of the congressionally approved Compact. *See also* Enabling Act, 61 Pub. L. No. 219, ch. 310 § 2(7), 36 Stat. 557, 559 (June 20, 1910) (New Mexico accepted the permanent

retention by the United States of "all rights and powers for the carrying out of the provisions" of the Reclamation Act).

New Mexico and New Mexico *amici* also ignore that Section 8 has a specific exemption regarding the rights of the United States "in, to or from any interstate stream." 43 U.S.C. § 383; *see Wyoming v. Colorado*, 259 U.S. 419, 463 (1922) (stating that, in drafting Section 8, Congress intended interstate streams that were the subject of litigation before the Supreme Court be excepted from application of state law); *Arizona v. California*, 373 U.S. at 623 (in Section 8, "Congress intended to leave untouched the law of interstate equitable apportionment"); *see also United States v. City of Las Cruces*, 289 F.3d 1170, 1184 (10th Cir. 2002) ("Quiet Title Case") (exemption did not apply because "the instant federal action does not involve an interstate equitable apportionment dispute").

d. Because New Mexico accedes to the Special Master's recommendation, the exceptions of New Mexico *amici* should be disregarded.

Purporting to support New Mexico's exceptions to the Report, New Mexico's *amici* in fact challenge the Special Master's ultimate recommendation regarding the motion to dismiss Texas' Complaint. *Amici* City of Las Cruces and ABCWUA, while stating they support New Mexico's exceptions, appear to argue for rejection of the Special Master's sound conclusion that Texas

has stated claims for New Mexico's Compact violations. Las Cruces Brief 21-29 (arguing that Texas' Complaint is barred by the doctrine of laches); ABCWUA Brief 24 (suggesting that Texas failed to state a claim under the Compact). This is not a position taken or supported by New Mexico or Colorado and should be rejected on that basis alone.

NMSU and NMPG argue the Special Master failed to consider the extent of groundwater development in New Mexico below Elephant Butte in arriving at his recommendation. NMSU Brief 6; NMPG Brief 8. This is ironic, as the thrust of their argument is otherwise that the Special Master should not have considered any extrinsic evidence or theory, and that none of his thorough and thoughtful analysis and conclusions should be accepted by this Court. Regardless, for purposes of determining the motion to dismiss, and accepting the allegations of the Texas Complaint as true, the Special Master considered that groundwater development has occurred in New Mexico since 1938. *See* Report 194-209. The underlying premise of Texas' Complaint is that groundwater (and surface) diversions in New Mexico are unlawfully depleting Project supply. *See* Texas Complaint ¶ 18 ("The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas."). The Special Master did not determine the specific nature and extent of the groundwater pumping (or unlawful surface water diversions)

in New Mexico and the extent of New Mexico's Compact violations. This will be the central issue before the Special Master upon remand of the case for further proceedings.

2. The Special Master's conclusions and recommendations do not implicate *Colorado River* abstention or the McCarran Amendment, and the general stream adjudication in New Mexico remains an inadequate forum to fully resolve claims relating to Rio Grande Project rights.

A fundamental point of confusion for New Mexico and its *amici* is the role of New Mexico state law with regard to the Rio Grande Project and Texas' Compact apportionment. New Mexico does not have the authority, either through a general stream adjudication or through state administration, to determine what Project water is available, if any, to New Mexico below Elephant Butte, and what is obligated to Texas as its Compact apportionment. That issue – identifying Texas' apportionment under the Rio Grande Compact and New Mexico's interference with Texas obtaining its Compact water through the Project – is the central question of this Original Action. And, as Texas' Compact apportionment is part and parcel of the rights of the United States in the Project, the nature and extent of the United States Project right must be determined in this case. Once this Court determines the respective rights of Texas and New Mexico with regard to Texas' Compact apportionment, and rights in and to Project

supply through EPCWID, then and only then does New Mexico have a role in administering the amount of water, if any, within New Mexico's apportionment below Elephant Butte.[9] New Mexico's jurisdiction extends to curtailing the exercise of rights in New Mexico to prevent interference with Project supply to ensure New Mexico's Compact compliance. New Mexico may not unilaterally determine as a matter of state law how much (or how little) Project water crosses the Texas state line for delivery to EPCWID.

New Mexico and its *amici* confuse the original jurisdiction proceeding in this Court with an adjudication of water rights, which it is not. The claims before this Court involve the enforcement of Texas' Compact rights which are directly related to and intertwined with the Rio Grande Project. The rights of the United States in and to the Rio Grande Project are appropriately before this Court, along with Texas' Compact claims, and cannot be decided in a state (or federal) court general stream adjudication. Because of the interrelated nature of the Compact and Project rights,

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[9] NMSU appears to contemplate for the first time that New Mexico groundwater development was necessarily limited after the 1938 Compact. NMSU Brief 6. But that is the only logical conclusion and is specifically pled by the Texas Complaint. *See* Texas Complaint ¶ 10 ("A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed."). A contrary result, *i.e.*, that development of groundwater in New Mexico could continue unimpeded under state law after the signing of the Compact, would nullify the benefits Texas bargained for and received under the Compact and would not have resolved anything. *See* Report 219.

this Court is the exclusive forum wherein the United States rights' in the Project can be determined as it is the only forum where the State parties to the Compact as well as the United States can be joined. *See* Report 233. This case is not an adjudication of the United States Project water right and will not result in a decree of that water right, but rather determine what the state adjudication court cannot: what amount of the Project water supply must be delivered to Texas and how that right should be protected.

Neither the McCarran Amendment, 43 U.S.C. § 666, nor the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) ("*Colorado River*"), is relevant here. The McCarran Amendment is a procedural statute providing a limited waiver of the United States' sovereign immunity for the adjudication and subsequent administration of federal law water rights. In *Colorado River*, this Court was asked to address two competing general stream adjudications, one filed in federal court by the United States and the other filed in state court by a state water user. In interpreting the McCarran Amendment, *Colorado River* found that, in the adjudication of water rights, the McCarran Amendment evinced a policy of "unified proceedings" for adjudication of all rights to water within a stream system. *Colorado River*, 424 U.S. at 819. Accordingly, the Court found that the federal court should abstain from proceeding in deference to the ongoing state court action relating to the adjudication of the same water rights. *Id.* at 820-21.

The adjudication of water rights is not at issue here. The United States is not seeking to assert its water rights or to have its Project water rights determined as a water rights claimant. The Complaints in this case raise the respective rights of Texas and New Mexico under the Rio Grande Compact and the United States' interest in the Project as it relates to Texas' Compact apportionment. As the Special Master found, the Project is "the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream. . . ." Report 204. The determination of quantity of and interference with a Compact apportionment is not and never has been within the purview of an adjudication court. Interpretation and enforcement of interstate Compacts is within the exclusive jurisdiction of this Court. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 567 (1963) (Court's original jurisdiction extends to a suit between states to enforce or declare compact rights); Report 216 ("[A]ny question of the rights of any signatory State to water apportioned by the 1938 Compact – including the rights to that portion of water mandated by compact to be delivered to lower New Mexico via the Rio Grande Project – must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court.").

This Court has never viewed its original and exclusive jurisdiction regarding interstate Compact disputes to be obviated by a state general stream adjudication. *See Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River in original jurisdiction action during pendency of general

stream adjudications on Colorado tributaries, *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master 15 (Feb. 10, 2010) (intrastate remedies did not preclude Montana from enforcing its rights under the Yellowstone Compact which "requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations"). Nor may a state adjudication court be deemed to be an adequate forum for resolution of interstate stream disputes. A general stream adjudication determines individual claims to ownership of water within a stream system, *see Dugan v. Rank*, 372 U.S. 609, 618 (1963); it is an inadequate forum for resolution of disputes between states as to the apportionment of the waters of a stream pursuant to an interstate compact, which are within this Court's exclusive original jurisdiction.

The New Mexico state court stream adjudication, to which Texas is not a party, U.S. Const. amend. X, and EPCWID is limited to a role as *amicus curiae*, cannot resolve the claims Texas and the United States have raised before the Court. The state court cannot consider Texas' allegations that New Mexico has violated its Compact obligations by depleting Project supply after release from Elephant Butte. Nor can the state court address the claims of the United States against New Mexico for interference with the United States' interests in the Project and obligations to deliver

Texas' Compact water to EPCWID. The New Mexico *amici* argue that water users in New Mexico would be left out in the cold if this Court makes interpretations of the Project rights as those relate to the Compact. NMPG Brief 24; NMSU Brief 31; Las Cruces Brief 37. This is not true. All claimants in the state adjudication will remain entitled to participate in the adjudication of any Project water right for the United States. But the state adjudication cannot interpret and enforce the United States' rights in and to the Project as those rights are intertwined with Texas' Compact right.

New Mexico's *amici* point to the fact that Texas has completed a stream adjudication for the Project water rights of EPCWID and the United States in Texas. NMSU Brief 23; ABCWUA Brief 30; *see* Certificate of Adjudication. What New Mexico and its *amici* fail to acknowledge is that the Texas Certificate of Adjudication specifically recognizes the right of EPCWID and the United States to store, allocate, and release Project water in New Mexico, Certificate of Adjudication, EPCWID Motion to File Complaint Brief App. 10-12, and assumes and relies on New Mexico's compliance with its Compact obligations, thereby allowing 67/155th "of all water stored in Project storage (as defined in the Rio Grande Compact) and legally available for release" to reach the Texas state line and EPCWID, *id.* 10. In contrast, the New Mexico adjudication court has declined to recognize the obligation of the Project to deliver water pursuant to the Texas decree or to recognize that, as a federal Reclamation project, the United States is entitled to seepage and return flow as

part of Project supply. *See* U.S. Brief 18-19. The adjudication court has also deemed that Project water supply which must be delivered to Texas is susceptible to a state law priority date despite the fact that as Compact water that water supply takes priority over all appropriations granted by New Mexico. Report 213; *see Hinderlider*, 304 U.S. at 106. EPCWID does not assert that the state adjudication court may not ultimately adjudicate a water right to the United States. But it cannot do so in derogation of EPCWID's Project rights and the rights of Texas and the United States under the Rio Grande Compact.

The *amici* further err in arguing that this Original Action is akin to the Quiet Title Case brought by the United States in federal district court in New Mexico, *United States v. City of Las Cruces*. Las Cruces Brief 32; NMSU Brief 21. The Quiet Title Case did not involve claims for enforcement and interpretation of the Rio Grande Compact and did not join or involve the signatory states to the Compact. Rather, that case was limited to a request by the United States to declare title with regard to certain waters in the lower Rio Grande in New Mexico. The case specifically did not involve "[t]he question of whether and how Rio Grande water should be apportioned among states." 289 F.3d at 1186. That, however, is exactly what is before this Court. Moreover, New Mexico and its *amici* neglect to mention that the Tenth Circuit did not affirm the dismissal of the Quiet Title Case. Rather, the Tenth Circuit remanded the case directing the district court consider the propriety of a stay under *Brillhart v.*

Excess Insurance Co. of America, 316 U.S. 491 (1942). *City of Las Cruces*, 289 F.3d at 1192-93. Following remand, the district court ordered that "this case is hereby stayed . . . [and] should further proceedings become necessary or desirable during the pendency of the water adjudications in New Mexico and Texas, any party may initiate proceedings." *United States v. Elephant Butte Irrigation Dist.*, 97-cv-00803 JAP-RLP (Aug. 15, 2002). While the United States has not moved to lift that stay, this case, in which both Texas and the United States allege violations of the Compact and the Rio Grande Project Act, indicates the day has come for this Court to address the claims of Texas and the United States, which are not amenable to resolution in the state adjudication court.

3. New Mexico and its *amici* misunderstand and fundamentally mischaracterize the Operating Agreement.

The Project currently is operated in accordance with the Operating Agreement, parties to which are the Bureau of Reclamation, EPCWID, and EBID. The Operating Agreement was part of the settlement of litigation among the Districts and the United States in which EPCWID filed suit to require the United States to properly account for and allocate Project water to EPCWID, EBID, and, pursuant to the 1906 Treaty, Mexico. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation District*, EP07CA0027 (W.D. Tex. Jan. 22, 2007). The Operating Agreement has

served since 2008 as the basis for Project operations. The Operating Agreement remains essential to the proper allocation of Project water and is a binding agreement as among the United States, EBID, and EPCWID. *See* U.S. Brief 11-12.

One of the key provisions of the Operating Agreement is allocation procedures that compensate EPCWID for unauthorized diversion of Project water in New Mexico, including groundwater pumping that captures Project water conveyed in the Rio Grande and the return flow of Project water conveyed by Project drainage system. Operating Agreement § 2.5. The allocation procedures are based on a compromise of the Operating Agreement parties as an alternative to the curtailment of all pumping of post-1938 wells that capture Project water. The compromise embodied in the allocation procedures provides that EPCWID surface water allocation is based on the Project conditions measured between 1951 and 1978. Any Project water captured by groundwater pumping or increased consumptive use in New Mexico in excess of the 1951-1978 conditions reduces EBID Project water allocations. This effectively allows New Mexico water users below Elephant Butte to enjoy the same combined amount of groundwater pumping and Project water use as occurred between 1951 and 1978. In effect, EBID repays EPCWID for its portion in excess of the 1951-1978 conditions of unauthorized Project water captured, diverted, and/or consumed by New Mexico water users.

The allocation procedures of the Operating Agreement are a compromise and settlement in lieu of ensuring Project (and thereby Compact) water deliveries to Texas based on the conditions negotiated under the 1938 Compact. The number of wells in existence in 1938 was small; even by 1946, only 11 irrigation wells were in operation in the Rincon and Mesilla Valleys. *See* Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico, Geological Survey Paper 1230 (1954) 107.[10] By 1964, however, over 1,000 irrigation wells had been drilled, and pumped an estimated 207,434 acre feet. *See* Water Resources of the Rincon and Mesilla Valleys and Adjacent Areas, New Mexico, New Mexico State Engineer Technical Report 43 (1981) 80.[11] The difference between the Operating Agreement compromise and the 1938 conditions detailed in Texas' Complaint is very significant in terms of the amount of Project water diverted in New Mexico for non-Project uses.[12] In economic terms this amounts to hundreds of millions, perhaps billions, of dollars of benefit to New Mexico since 1938 and continuing into the future if not corrected by the Court.

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[10] Available at https://pubs.usgs.gov/wsp/1230/report.pdf.

[11] Available at http://www.ose.state.nm.us/Pub/TechnicalReports/TechReport-043.pdf.

[12] The 1951-1978 conditions embodied in the Operating Agreement also include Texas groundwater pumping (the Canutillo well field) and the effects of that groundwater pumping on Project surface flows.

Yet, New Mexico amazingly and erroneously claims the Operating Agreement is inequitable to New Mexico and radically alters historic project water allocations. New Mexico Brief 10. The New Mexico *amici* either fail to understand or deliberately mischaracterize the Operating Agreement, claiming the Agreement has "led to drastic reductions in . . . surface supplies" to EBID farmers, NMPG Brief 2; and that under the Operating Agreement "New Mexico has received much less than 57% of the surface water than was originally allocated." Las Cruces Brief 24. But New Mexico and its *amici* provide no factual basis for these claims, as there is none. They fail to inform the Court that the share of Project water (including both surface water diversions, groundwater capture, and increases in consumptive use) enjoyed by New Mexico under the Operating Agreement is greater than the amount New Mexico received under the 1938 Compact conditions, prior to large scale groundwater development and the conversion of New Mexico's irrigated land from low water use crops like cotton to high water use crops like pecans.

It is EPCWID and Texas that have suffered for years as a result of the inability of the Project to deliver EPCWID's rightful allocation of Project water (and thus Texas' rightful allocation of Compact water) due to New Mexico groundwater pumping. It is EPCWID and EBID that, along with the United States, reached a settlement to address historic over-deliveries of Project water to New Mexico caused by groundwater capture and increased consumptive use in New Mexico. As

the record is further developed in this case, Texas and EPCWID will show that the Operating Agreement, far from what New Mexico and the New Mexico *amici* erroneously describe, has and continues to greatly benefit New Mexico while limiting the harm caused by New Mexico to Texas. If the Operating Agreement were no longer in effect, EPCWID agrees with Texas that the Compact requires deliveries to EPCWID through the Project to be based on the conditions in effect at the execution of the Compact in 1938. *See* Texas Complaint ¶¶ 18-19.

4. The U.S. Complaint states claims under the Rio Grande Compact based on the interrelated nature of the Rio Grande Project and the Compact, but not because the United States has unilateral operational control of the Project.

The U.S. Complaint states a claim for both Compact violations and violations of Reclamation law, but not because the United States unilaterally controls or operates the Rio Grande Project. The Special Master found that the Compact rights of Texas are intertwined with the Project. Report 201-02, 209. Yet, the Special Master erroneously concluded that the United States did not state a claim under the Rio Grande Compact because it is not a party to, and has no apportionment under, the Compact. Report 231. As the United States argues in its exceptions, "the Compact protects the water that is released from the Project in order for it to reach its intended destination." U.S. Brief 29. The

United States may seek relief against New Mexico to protect the operation of the Project and its contractual obligations to deliver water to EBID and EPCWID. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); U.S. Brief 39-40.

EPCWID supports the exception of the United States that the U.S. Complaint states a claim for relief under the 1938 Compact, with one important qualification: the U.S. Brief appears to claim that the United States, and only the United States, is responsible for operation of the Rio Grande Project. U.S. Brief 11, 40. This is not true. Since the inception of the Project, as exemplified in the 1938 contract, the Certificate of Adjudication, the Title Transfer, and the Operating Agreement, EPCWID, together with EBID, has an integral role in Project operations and works jointly with the United States to operate the Project, including allocation, release and delivery of Project water. Additionally, pursuant to a Joint Powers Agreement, EBID and EPCWID jointly operate Project works which cross and re-cross the Texas-New Mexico state line to effectuate delivery of water to Project water users in both states and districts. *See* EPCWID Reply in Support of Motion to Intervene (July 10, 2015), App. 9-21.

The Special Master appears to have misunderstood the practical and legal relationships crucial to operation of the Project when he concluded "[i]t is the United States that owns and operates the Project's primary dams and storage facilities and determines how water is released and allocated between EBID and EP No. 1 [EPCWID] pursuant to the Rio Grande Project."

Report 273. This conclusion is incorrect. While the United States has an interest in the Rio Grande Project and protecting its obligations to deliver Texas' Compact water to EPCWID, this interest is not based on superintending or unilateral control of the Project by the United States. The Texas Certificate of Adjudication provides that EPCWID is the part owner of the Project right, which includes a right of storage and release in New Mexico for delivery and use by EPCWID. *See* Certificate of Adjudication, App. 10-11. The Operating Agreement, which forms the basis for the current operation of the Project, is reliant on the Allocation Committee, comprised of a representative from each of the Districts and from Reclamation. The operating manual, which is the guts of the Operating Agreement, can only be changed by agreement among the United States, EBID, and EPCWID. Moreover, as a result of the Title Transfer, EPCWID owns and operates the Project distribution and drainage facilities in Texas as well as cross-border facilities in New Mexico pursuant to the Joint Powers Agreement with EBID.

The United States works together with the irrigation districts, not unilaterally, in operation of the Project, and EPCWID does not support the United States' exception to the extent the United States makes any assertion to the contrary.

CONCLUSION

The Special Master's Report should be adopted with respect to the recommendation that New Mexico's motion to dismiss Texas' Complaint be denied and to the recommendation that New Mexico's motion to dismiss the U.S. Complaint's claims under federal Reclamation law be denied. The Report should not be adopted with respect to the recommendation that New Mexico's motion to dismiss the U.S. Complaint's Compact claims be granted. The Court should order all claims asserted by Texas and the United States to proceed before the Special Master.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER[1]

Pursuant to the Court's Orders dated March 20, 2017 and March 31, 2017, on June 9, 2017, the State of New Mexico filed its Exceptions to the First Interim Report of the Special Master (the "Report") in this original action, and its brief in support thereof. Various other New Mexico entities, including several governmental entities that have already participated in briefing as *amici curiae* in these proceedings, and several other entities now seeking leave to participate as *amici* for the first time, also filed exceptions to the Report. The City of El Paso ("City" or "El Paso") submits this *amicus curiae* brief in support of the State of Texas' Reply to the exceptions filed by the State of New Mexico and by various *amici curiae* entities from New Mexico.

INTEREST OF *AMICUS CURIAE*

The City of El Paso, Texas is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its

[1] By Motion approved at its regularly scheduled meeting on July 25, 2017, the El Paso City Council approved the City's filing of this amicus brief. *Cf.* S. Ct. R. 37.4 (City not required to file motion for leave). Notice of El Paso's intent to file this amicus brief was also timely provided to counsel of record for all parties.

continued growth and prosperity depend upon having an adequate water supply, made up of both groundwater and Rio Grande Project surface water. In order to moderate its reliance on groundwater from the Hueco Bolson and to confront surface water shortages in drought years, El Paso has undertaken a water management strategy that promotes water conservation, maximizes surface water use, increases use of reclaimed water, and has developed desalination of brackish groundwater and potential future groundwater importation from other nearby groundwater basins in Texas.[2]

The continued availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project ("Project"). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 ("EPCWID") and the United States Bureau of Reclamation ("USBR") that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies.

Actions by New Mexico that enable and institutionalize increased demands on Project water through groundwater pumping in New Mexico, affecting the

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[2] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://epwu.org/water/water_resources.html.

drain water and irrigation return flows that are part of Project water supply, remain a cause of serious concern to El Paso and Texas. Protecting the historical operation of the Project as embedded in Texas' rights under the Rio Grande Compact ("Compact") is a direct and sustained interest of all Texas users of Project water, including those such as El Paso that have invested heavily to secure contractual rights for this water supply. Addressing these issues is a matter of critical importance to the almost 750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUPPLEMENTAL STATEMENT

El Paso accepts and endorses the Jurisdiction and Statement set out in the Exception of the United States, and those included in the Reply to Exceptions by the State of Texas, and would further add the following.

Exceptions to the First Interim Report of the Special Master have been filed by the State of New Mexico, the State of Colorado, and the United States. Additionally, *amicus curiae* briefs in support of New Mexico's exceptions have been filed by the City of Las Cruces ("Las Cruces") and the Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"). Motions for leave to file *amicus curiae* briefs supporting New Mexico, with those accompanying briefs, have been filed by

New Mexico State University ("NMSU") and by the New Mexico Pecan Growers.

New Mexico takes the rather unusual position of acceding to the Special Master's recommendation that its Motion to Dismiss Texas' Complaint be denied, and also to the Special Master's recommendations on other motions, but urging the Court to reject the analysis and rulings that underlie those recommendations.

Several common themes emerge from the latest briefing of New Mexico and these New Mexico *amici*, including that: (a) New Mexico's jurisdiction and sovereignty over surface and groundwater below Elephant Butte Reservoir have been erroneously displaced; (b) the effect of the Special Master's recommendations is the "federalization" of New Mexico's surface and groundwater resources below Elephant Butte Reservoir, contrary to the intent of federal reclamation law; and (c) New Mexico law and the pending water rights adjudication proceeding in New Mexico should alone define the water rights of the United States and the Rio Grande Project.

El Paso supports the Reply by the State of Texas to these issues, and to others raised by the parties and New Mexico *amici*, and will not attempt to respond to all issues. Instead, El Paso provides information and authority not addressed by these other briefs, describing its Rio Grande Project water supply, its groundwater supply, and the interrelation of these two sources

to successfully preserve the Project water supply for all users.

SUMMARY OF ARGUMENT

New Mexico's proposal, that its Motion to Dismiss should be denied but the Special Master's underlying basis for that denial should be rejected, is illogical and contrary to the Court's intent in accepting the United States' suggestion that this underlying issue of compact construction be presented as a threshold issue, for resolution by a New Mexico motion to dismiss. *See* U.S. Amicus Br., December 2013, at 22-23.

The Report's analysis and recommendations would not have the effect of divesting New Mexico of its sovereignty or authority to regulate surface and groundwater resources below Elephant Butte Reservoir. Rather, they would simply impose limits on how New Mexico can exercise that authority. Specifically, New Mexico cannot allow its water users to "grab back" water that it has delivered into Elephant Butte Reservoir pursuant to the Rio Grande Compact, Act of May 31, 1939, Ch. 155, 53 Stat. 785, and New Mexico is responsible to ensure compliance with its Compact obligations. In fact, New Mexico's experience complying with the Pecos River Compact demonstrates that the exercise of such sovereignty is essential to achieving and maintaining compact compliance.

Recognizing that existing New Mexico water uses, which affect the drain water and irrigation return

flows that are part of Project water supply, will require contracts with the United States (and New Mexico's irrigation district under the Project, the Elephant Butte Irrigation District ("EBID")) for use of that water is not incompatible with New Mexico's state sovereignty and water management. El Paso's existing contracts for Project water supply actually demonstrate that such contracts can provide a valuable vehicle to preserve the Project water supply for other users.

New Mexico retains the authority to adjudicate and administer water rights in the Lower Rio Grande, including Project water rights, but New Mexico cannot take actions inconsistent with its obligations under the Rio Grande Compact as determined in this case. Like the adjudicated water rights in *Hinderlider v. La Plata River & Cherry Creek Ditch Company*, those rights and the state administration of them are subject to a compact's equitable apportionment. 304 U.S. 92, 110 (1938).

ARGUMENT

1. A ruling on the Report's underlying analysis is necessary.

The core legal issue in this interstate dispute is whether New Mexico's obligations under the Rio Grande Compact end with its delivery of water into Elephant Butte Reservoir. As noted by the Solicitor General, responding to the Court's invitation to brief Texas' Motion for Leave to File Complaint, Texas and

New Mexico differ over whether the Compact allows New Mexico to permit users in New Mexico to divert surface water and groundwater hydrologically connected to the Rio Grande in excess of the amount authorized for use in New Mexico under the Project. *See* U.S. Amicus Br., December 2013, at 22-23. The Solicitor General suggested inviting New Mexico to file a Rule 12(b)(6)-like motion to dismiss in order to allow presentation of this threshold issue and obtain an early ruling thereon.

New Mexico, now that it has the Special Master's recommendations, would prefer not to have the analysis supporting them. N.M. Br. at 12-13, 15.[3] The Court should reject this proposal. If New Mexico's legal position is correct, that its obligations to Texas under the Compact cease upon delivery of water into Elephant Butte Reservoir, then the entire case should be dismissed. If New Mexico is incorrect, then the case should proceed, within the framework of the resolution of this threshold issue.

2. The Report's analysis does not strip New Mexico of its sovereign authority over water within the State.

New Mexico and several New Mexico *amici* argue that the Report's analysis would deprive the State of New Mexico of its authority to regulate water rights

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[3] Except as otherwise noted, citations herein to a party's or amicus entity's brief are to their exceptions to the Report, filed on June 9, 2017.

and water use below Elephant Butte Reservoir. N.M. Br. at 16-29; Las Cruces Br. at 3-4; NMSU Br. at 24-30. El Paso disagrees. The Report states that New Mexico may not authorize its water users to "grab back" water that has been delivered to the Project. Report at 202. Such actions would prevent Texas from receiving the equitable apportionment accomplished by the Compact. Report at 210-11.

This is not an "abrogation" of New Mexico's sovereign authority. N.M. Br. at 25. It is a ruling that New Mexico may not exercise its sovereign authority in a manner that violates its obligations under the Compact and prevents achieving the Compact's equitable apportionment. That is not a new or radical concept; it is at the heart of much of the interstate water litigation heard by the Court. *See, e.g.*, *Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042 (2015); *Texas v. New Mexico*, 462 U.S. 554 (1983); *Hinderlider*, 304 U.S. at 106.

New Mexico's obligation is to exercise its sovereign authority to ensure that water deliveries under the Compact are made, and that such water arrives in Texas with no greater depletions by New Mexico water users than would have occurred in 1938 when the states entered into the Compact. To strip New Mexico of its sovereign authority over this water would, in fact, be a step that prevents, rather than promotes, New Mexico's compact compliance.

New Mexico's decades of experience achieving compliance with the Pecos River Compact provide an instructive example. Following the Court's decision in

Texas v. New Mexico, 482 U.S. 124 (1987), and appointment of a River Master to assure New Mexico's compliance with its delivery obligations under the Pecos River Compact, New Mexico has not only retained its sovereign authority over water use in the Pecos River Basin, it has adopted a systematic and creative approach to conjunctive management of surface water and groundwater use to assure compact compliance. Existing water rights in the basin were acquired and retired by the New Mexico Interstate Stream Commission ("NMISC"). A Settlement Agreement was entered into among the New Mexico State Engineer, NMISC, USBR, the Carlsbad Irrigation District and the Pecos Valley Artesian Conservancy District, with the goals of compact compliance and getting the basin back into hydrologic balance following groundwater pumping that had over-depleted the basin. *See* Greg Lewis, New Mexico Interstate Stream Commission, *The Pecos Settlement – Manage Conjunctively Or Else!*, 58th Annual New Mexico Water Conference, November 2013, at pp. 99-101.*[4] Additional irrigated land was acquired and retired; contracts with USBR were entered to allow reclamation project water (normally reserved for irrigation of project lands) to be used for Pecos River Compact deliveries; additional studies and modeling were

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[4] A copy of the Lewis article is available on the NMISC web site at: https://nmwrri.nmsu.edu/wp-content/uploads/2015/watcon/proc58_1/Lewis.pdf. Also, accompanying the filing of this brief, pursuant to Rule 32.3 the City of El Paso has submitted a letter to the Clerk of the Court describing additional documents proposed to be lodged with the Clerk, and has indicated with an "*" those materials when quoted herein.

undertaken; supplemental and augmentation wells were drilled and capacity assigned to NMISC to be available for delivery of water to meet compact obligations; and the duties of the State watermaster for the Pecos River were expanded. Settlement Agreement, March 25, 2003, at pp. 3-7.*[5]

The results of this multi-faceted effort by New Mexico and affected stakeholders were impressive. Since 1987, New Mexico has complied with its Pecos River Compact delivery obligations to Texas every year. Further, since the execution of the 2003 Settlement Agreement New Mexico has even accumulated a 100,000 acre-feet delivery credit that it can draw against for future deliveries. The graphic results of New Mexico using its sovereign authority to achieve, rather than frustrate, Pecos River Compact compliance are shown by Figure 7 from the Lewis paper, a copy of which is attached to this brief as Appendix 1.

The lesson from the Pecos River Compact compliance experience is that New Mexico needs to retain its sovereignty over water below Elephant Butte Reservoir in order to assure its ability to comply with its Rio Grande Compact obligations. Texas has not requested, and the Special Master has not recommended, that New Mexico be stripped of its sovereign authority to regulate water use in New Mexico. To be sure, that state-level authority is not unrestricted, but exercise of

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[5] A copy of the Settlement Agreement is also available on the New Mexico State Engineer's web site: http://www.ose.state.nm.us/Compacts/Pecos/PDF/settlement_03-25-2003.pdf.

that authority over other New Mexico water users is essential for New Mexico to achieve and maintain compact compliance.

3. Preserving the integrity of Project water supply is not incompatible with New Mexico's administration of state water rights.

Related to their respective arguments about "relinquishment," "divestment," and "complete abdication" of New Mexico's state sovereignty under the Report's analysis, New Mexico and several New Mexico *amici* argue further that the Special Master's recommendations and analysis would effectively "federalize" the Rio Grande Basin, and by extension set a troubling precedent affecting states and water rights involved with other federal reclamation projects. These arguments are particularly directed at the United States' pleadings and briefing positions regarding the requirement to contract with USBR in order to use Project water, including the types of hydrologically connected groundwater affecting the Project, at issue in this case. N.M. Br. at 27-28 n. 8, 22 (warning of "control and dominion [passing] silently to the United States"); Las Cruces Br. at 4 n. 3, 31, 37 (arguing the result that the United States would become "the administrator of water rights in the Lower Rio Grande"); ABCWUA Br. at 12, 32-38. The dire and dramatic picture painted by these arguments should be disregarded, because it distorts the Report's analysis and ignores how the Project water contract requirement could be reasonably applied to facilitate New Mexico's compact compliance.

The Rio Grande Project is El Paso's sole source of surface water supply, providing up to 70,000 acre-feet of water during years of full supply, and providing 50% or more of El Paso's total water supply. *See supra* note 2. As recognized by the Report, only entities having contracts with the United States may receive deliveries of water from a reclamation project. Report at 232 (citing *Bean v. United States*, 163 F. Supp. 838 (Ct. Cl. 1958) (citing *Ide v. United States*, 263 U.S. 497, 505 (1924))). Over the decades of development of the Project, El Paso has contracted with EPCWID and USBR to obtain its supply of Project water. These El Paso contracts provide a good example not only of how Project water supply can be used for purposes other than irrigation of Project lands, but also how other activities affecting Project water supply can be taken into account.

Water from a federal reclamation project may be sold and supplied for municipal purposes pursuant to the Act of February 25, 1920, 31 Stat. 451; 43 U.S.C. §521. *See El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 918-20 (W.D. Tex. 1955), *affirmed*, 243 F.2d 927 (5th Cir. 1957), *cert. denied*, 355 U.S. 820 (1957). Pursuant to that statute, El Paso has entered into a series of contracts with EPCWID and USBR to obtain Project water, through a variety of mechanisms:

1. *Ownership of land within EPCWID that is entitled to receive irrigation water, converting that water supply to municipal use. See* Contract No. I16r-1712 to Supply Water to the City of El Paso for Municipal Purposes, December 1, 1944 (authorizing El Paso to own

and obtain the water supply from up to 2,000 acres within EPCWID);* Contract No. 01-WC-40-6760 Implementing Third-Party Contract, June 11, 2001 (authorizing El Paso to obtain the Project water supply for an additional 1,000 acres within EPCWID).*

2. *Assignment of water supply rights from owners of small tracts (less than two acres) within EPCWID and also within El Paso's city limits that are entitled to a Project water supply. See* Contract No. 14-06-500-762 Permitting the City of El Paso to Acquire Additional Water Supply for Municipal Purposes, December 20, 1962.*

3. *Purchase of excess Project water that is not required for irrigation of Project lands within EPCWID. See* 2001 Implementing Third-Party Contract, §7.*

4. *City of El Paso's state water right. See* Certificate of Adjudication No. 23-5942,* for unappropriated storm, flood and return waters from the Rio Grande, issued pursuant to the Contract to Permit the City of El Paso to take Water from the Rio Grande when in Excess of Project Requirements, August 10, 1949, between EPCWID and El Paso, approved by the U.S. Secretary of the Interior.*

Additionally, El Paso obtains a supply of Project water from the Lower Valley Water District Authority ("LVWDA") also in El Paso County, which has its own similar contractual arrangements to obtain Project water from EPCWID and USBR. In that case, El Paso receives Project water supply in return for the potable water supply provided to LVWDA by the City. The City

could also obtain Project water supply through "forbearance agreements" with property owners within EPCWID, under which landowners would be compensated and agree to forego delivery of Project water for a period of time in order to make it available to the City; however, El Paso and EPCWID have not yet completed the necessary legal arrangements to exercise this option. *See* Contract No. 00-WC-40-R6460, Third-Party Contract, December 1, 1999.*

Like the groundwater pumping now occurring below Elephant Butte Reservoir in New Mexico by multiple entities and individuals, El Paso's pumping of groundwater from the Hueco Bolson and Mesilla Bolson in Texas impacts the delivery of Project water to EPCWID. This issue has been addressed and compensation provided for the impact on EPCWID, by several provisions of the 2001 Implementing Third-Party Contract, including:

1. El Paso agrees to provide 12,000 acre-feet per year of treated wastewater effluent from its Haskell Street Wastewater Treatment Plant between February 15th and October 15th of each year. 2001 Implementing Third-Party Contract, §8.* Depending upon the Project water supply then available and the amount of effluent discharged, El Paso receives a variable credit against its payment obligations to EPCWID for delivery of this effluent. *Id.* §9.C.*

2. El Paso agrees to provide treated sewage effluent from its other treatment plants in an amount equal to 25% of the Project water supplied by EPCWID, less a credit for the Haskell Street effluent. 2001 Implementing Third-Party Contract, §12.A.*

3. Underflow of the Rio Grande intercepted by El Paso's Mesilla Valley well fields is considered to be Project water delivered to the City, for which the City must pay the same rate as for other Project water delivered under this contract, unless the City discharges other usable sewage effluent equal to 1.6 times the amount of underflow pumped. 2001 Implementing Third-Party Contract, §12.B.* This contract also provides a specific procedure by which the amount of underflow captured by El Paso's wells is determined. *Id.* Exhibit C.*[6]

All of these arrangements assure that El Paso will compensate EPCWID, and by extension the United States, for the impact that El Paso's own groundwater pumping has on the Project water supply, either monetarily or with sewage effluent of acceptable quality.

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[6] Review of that exhibit demonstrates that El Paso's groundwater pumping does not have a one-to-one impact on Project water; in fact, less than one-third of the total groundwater pumped by El Paso is considered underflow, and El Paso's payment obligation is proportional to that. Similarly, El Paso anticipates that much of the groundwater production in New Mexico will not have a one-to-one impact on Project water.

Water rights adjudication and administration by the State of Texas is not displaced by these contractual arrangements or by the recognition of USBR's and EPCWID's rights in Project water supplies. Rather, these contracts are fully in accord with both applicable federal law and state water laws. Comparable arrangements may be possible for existing groundwater uses in New Mexico that impact Project water supplies. Of course, this does mean that New Mexico users may have to pay for Project water that has historically been taken without payment.

4. The Court's jurisdiction over claims based on Compact requirements does not threaten New Mexico's pending Lower Rio Grande Adjudication.

Both New Mexico and Las Cruces are anxious to ensure that prior rulings by the New Mexico state court in the pending proceedings to adjudicate claims in the Lower Rio Grande (the "LRG Adjudication") not be modified or supplanted by the Special Master's analysis or the Court's proceedings in this original action. On this issue, New Mexico's exceptions to the Report, and Las Cruces' supporting brief, further manifest their respective arguments regarding the interplay of federal reclamation law with state jurisdiction over water rights adjudication and administration, including arguments regarding loss of state sovereignty and so-called "federalization" of all water resources in the Lower Rio Grande. N.M. Br. at 36-42; Las Cruces

Br. at 29-37. New Mexico accedes to the Special Master's recommendation that the Court exercise its non-exclusive original jurisdiction under 28 U.S.C. §1251(b)(2) to hear the United States' reclamation law claims, but urges that the United States should be precluded from attempting to relitigate claims regarding the nature and scope of its "Project water rights" as determined in the LRG Adjudication. N.M. Br. at 1, 56-57 & n. 15; *see also* NMSU Br. at 3-4, 31-36. Las Cruces apparently does not accept New Mexico's qualified approach, arguing that granting jurisdiction over the United States' reclamation law claims invites the possibility that the United States prevails and becomes the "administrator of water rights in the Lower Rio Grande," with "an alternative permitting process by federal contract that supplants vested state rights and administration." Invoking the principles of *Colorado River* abstention,[7] Las Cruces seems to diverge from New Mexico and suggest that the Special Master's recommendation be rejected outright. Las Cruces Br. at 37.

Las Cruces' hyperbolic characterization of the effects of the Special Master's recommendation regarding the United States' claims should be rejected, and even New Mexico's milder assertions of concern for protecting state jurisdiction in the LRG Adjudication are not well founded. New Mexico's jurisdiction to adjudicate the Lower Rio Grande under New Mexico law, and thereafter to continue administration of water

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[7] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

users' rights under New Mexico law, is not a proposition mutually exclusive with the Court's jurisdiction to decide the issues of Compact compliance presented in this original action. The focus of this case is New Mexico's obligations under federal law, including the Rio Grande Compact, not to interfere with Texas' rights to Compact deliveries and not to interfere with the United States' operation of the Rio Grande Project. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (compact when approved by Congress becomes a law of the United States).

Nothing in the Report precludes New Mexico's courts, and the parties before them (including the United States and El Paso), from proceeding to litigate water rights claims *inter se* under New Mexico law, just as the Texas court has already done (including the United States) for the Upper Rio Grande in Texas. *In re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, Final Decree (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006). Under the Court's *Hinderlider* precedent, however, an agreement made by compacting states for equitable apportionment of an interstate stream "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 105-06; *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36 (Ct. App. 1993) (citing *Hinderlider*).

Las Cruces' assertion that the United States' claims in this action are actually an attempt to relitigate and gain ownership and control over groundwater in storage in the Lower Rio Grande are wholly unsubstantiated. Las Cruces Br. at 31. As argued above, El Paso agrees that New Mexico must maintain its sovereignty over water resources in New Mexico, precisely so that it can devise and oversee appropriate strategies of its choosing to ensure its compliance with the Compact. As for "federalization" of water resources related to the Project and Compact compliance, as El Paso's own contract and water right history demonstrates, there is a middle ground within the statutory requirement for a federal contract to take and use Project water. New Mexico water users could contract with USBR, and EBID and/or its property owners entitled to receive Project water, for the extent that their actions detrimentally affect Project water supply, while taking appropriate compensatory action to avoid reducing deliveries to Texas.

CONCLUSION

For the reasons set forth above, as well as those set forth in the Reply to Exceptions filed by Texas, New Mexico and its supporting *amici curiae* entities have not established a legal or factual basis to reject or substantially disregard or modify the Report. The Special Master's recommendations and underlying analysis regarding New Mexico's Motion to Dismiss should be adopted.

Respectfully submitted,

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JULY 2017

APPENDIX TO BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS

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New Mexico's Cumulative Credits and Deficits for Pecos River Compact Deliveries

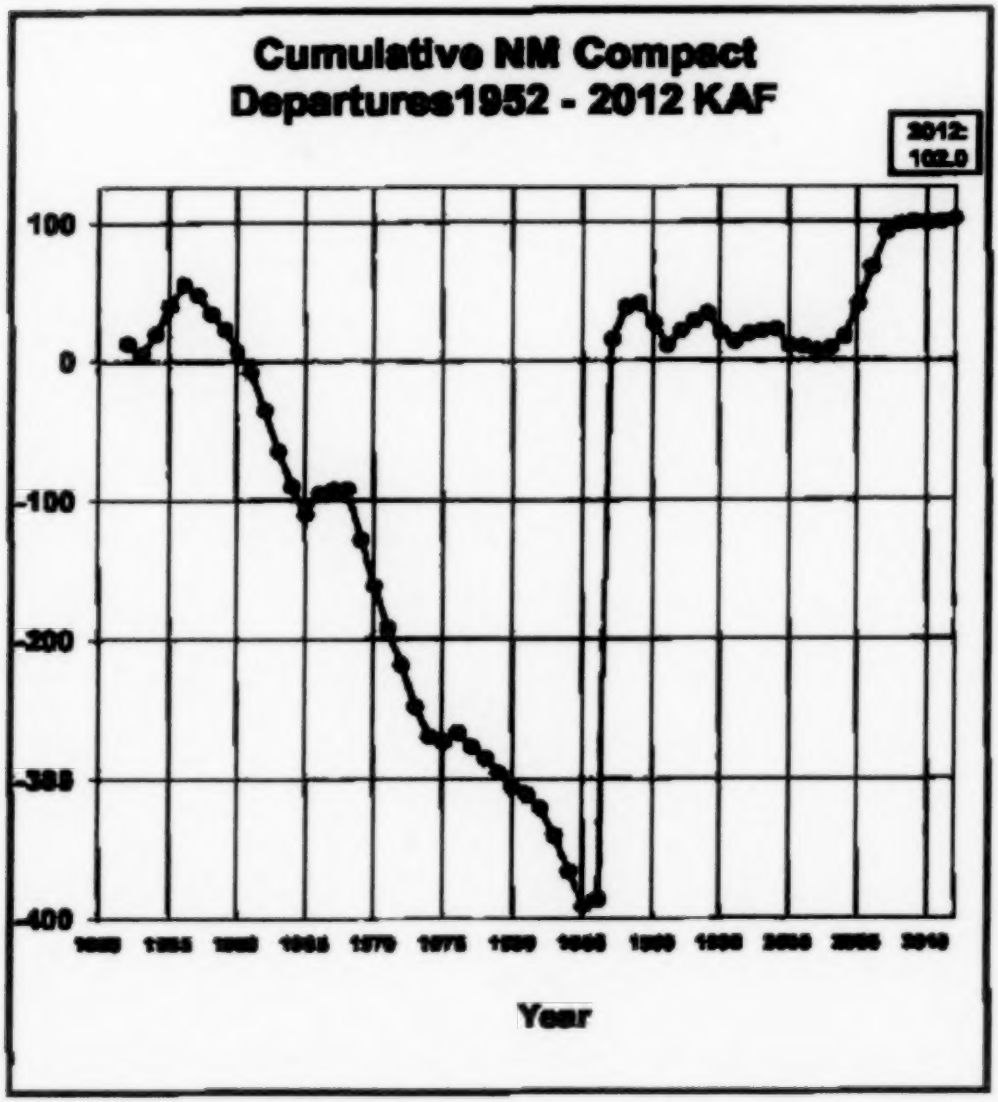

Figure 7. Compact Compliance Post-Settlement

RECORD
AND
BRIEFS

No. 141, Original

FILED
JUL 28 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

ELEPHANT BUTTE IRRIGATION DISTRICT'S AMICUS CURIAE BRIEF IN SUPPORT OF THE STATE OF TEXAS

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INTEREST OF ELEPHANT BUTTE IRRIGATION DISTRICT

A. History of the District and Relevant Contracts

Elephant Butte Irrigation District ("EBID") is an irrigation district and a New Mexico quasi-municipal corporation,[1] duly incorporated and organized under New Mexico law, with its principal place of business in Doña Ana County, New Mexico.[2] EBID is governed by a nine-member board of directors, each of which is a farmer/landowner within one of nine member districts. EBID's powers, rights, and duties derive from the New Mexico Constitution, New Mexico Statutes, and all rights, benefits and privileges that derive from the Reclamation Act of 1902 and contracts with the United States. EBID was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under Federal Reclamation law to provide water supplies from the

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[1] Pursuant to Rule 37.4 of this Court, as a political subdivision of the State of New Mexico and filing through its authorized law officer, EBID files this brief as *amicus curiae* without seeking consent of the parties or order of this Court. Counsel of record for all parties received notice ten days prior to the due date of the *amicus curiae's* intention to file this brief.

[2] On December 3, 2014, EBID filed a Motion for Leave to Intervene in this cause. In his First Interim Report, the Special Master recommended to this Court that EBID's Motion be denied. Proposed Intervenor EBID did not take exception to the Special Master's recommendation regarding EBID's Motion, but it does take this opportunity to impose upon this Court the significance of EBID's interest in these proceedings as it relates to the issues raised by the Exceptions filed by the Parties and Amici.

Lower Rio Grande for irrigation of lands in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, §73-10-16. *See* First Interim Report of Special Master ("Rep.") at P. 237. EBID assumed all of the rights and accepted all of the duties of its predecessor organization, the Elephant Butte Water Users Association ("EBWUA"). New Mexico Statutes, ch. 73, Art. 10, §73-10-45. The EBWUA, which was organized in 1905 by property owners situated along the Rio Grande in southern New Mexico, formed after the Reclamation Act was passed to assist the United States in appropriating and beneficially using water and managing the works for the New Mexico portion of what would become the Rio Grande Project ("Project").

Under authority provided by New Mexico Statute and Federal Reclamation law, EBWUA, and subsequently EBID, were authorized to enter into contracts with the United States for the construction, operation and maintenance of facilities that would develop water supplies for delivery to irrigators in southern New Mexico, and to construct, operate and maintain various facilities – canals, ditches, reservoirs, sites, water rights, rights-of-way, and other property necessary for this purpose. New Mexico Statutes, ch. 73, Art. 10, §73-10-16. Pursuant to this authority, the EBWUA entered into a contract with the U.S. Bureau of Reclamation for water deliveries from the Project, which Congress authorized in 1905. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 (1905). EBWUA was dissolved when EBID was organized pursuant to authority of New Mexico law to cooperate with the United States in providing water for irrigation from the Lower Rio Grande and, as the

successor to EBWUA, EBID executed a contract with the United States on January 7, 1918. *Holguin v. Elephant Butte Irrigation District*, 575 P.2d 88, 90 (N.M. 1977). In 1938, again pursuant to statutory authority provided to EBID, it entered into another contract with the United States under which EBID provides water from the Project for water users in the Project area in New Mexico. 1938 Contract, Rep. DVD Doc. 12. Under the 1938 contract, EBID receives 88/155th of the water supply of the Project, which it delivers to constituent water users to irrigate 90,640 acres of land in New Mexico. Rep. 245.

EBID administers the Project in New Mexico pursuant to contract, and owns and operates the Project's distribution and drainage facilities in New Mexico. In 1971, EBID completed repayment of New Mexico's share of the construction costs for the Project and requested that the physical operations and maintenance of the Project be returned to the local users consistent with its repayment contracts. After EBID repaid its contractual obligation to the United States, Congress, in 1992, authorized the Secretary of the Interior to transfer to EBID the title to certain Project facilities in New Mexico, consisting of canals and drainage systems. Pub. L. No. 102-575, 106 Stat. 4705 (1992). In 1996, the Secretary of the Interior issued deeds that transferred title to the facilities covered by the Act of Congress to EBID. Thus, EBID owns and operates the Project distribution and drainage facilities in New Mexico.

The contracts that allowed the transfer to occur also required that an operating agreement among the Project participants be developed. This was especially

important since the Project, which had been operated in both states by the United States, was now going to be separately owned and operated by EBID and the Texas Irrigation District, El Paso County Water Improvement District No. 1 (EP1). In addition, arrangements needed to be made to assure that the operation of the Project (via the Operating Agreement) considered the Treaty with Mexico that governs the equitable distribution of the waters of the Rio Grande between the United States and the Republic of Mexico. This Treaty guarantees the Republic of Mexico 60,000 acre feet of Project water in a full allotment year. *Convention Between the United States and Mexico Providing for the Equitable Distribution of Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, 34 Stat. 2953 (1906) (1906 Treaty). In 2008, the United States, EBID and EP1 finally entered into the Operating Agreement settlement, as required by repayment contracts, and as necessitated by ongoing litigation regarding the allocation and delivery of water within the Project.

The 2008 Operating Agreement implemented two key changes to the allocation procedure. First, it provided the ability for each district to carry over unused allocation balance(s) from one year to the next in their own accounts. Secondly, it established the period 1951-1978 (the "D2" period) as the baseline for allocation of water to EP1, with EBID absorbing the impacts of any shortages in divertible water from that baseline for a given level of annual release from Caballo Reservoir. Thus, the 1938 contract allocated surface water between EBID and EP1, and the 2008 Operating

Agreement modified that procedure to ensure delivery of water to EP1 under current conditions of groundwater use in New Mexico.

The importance of the 2008 Operating Agreement cannot be overstated. The agreement, in essence, defines allocation and operating procedures to guarantee the delivery of water through the New Mexico portion of the Project to Texas (EP1) and Mexico based on the quantity of water available for diversion for a given release during the baseline period. The Agreement does not restrict groundwater pumping in New Mexico, but instead requires EBID to deliver sufficient surface water to guarantee that downstream obligations are met. The Operating Agreement offsets the effects of all groundwater pumping in the New Mexico portion of the Project, including those by entities other than EBID. Essentially, EBID is offsetting the effects of all pumping in New Mexico in excess of the 1951-1978 baseline condition. Non-Project entities in New Mexico, including municipal/industrial users, are impairing the Project water supply, and since EBID is required to keep EP1 (geographic Texas) whole under the Operating Agreement, the impacts by non-Project entities are paid for directly by EBID's Project surface water supply.

B. The Rio Grande Project and the Rio Grande Compact

The Project was authorized by act of Congress known as the Rio Grande Project Act of 1905. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 (1905). The purpose

of the Project was to provide water for irrigation of lands in southern New Mexico and far western Texas, and to fulfill the United States' anticipated treaty obligation to allocate a portion of the waters of the Rio Grande to the Republic of Mexico, which obligation eventually came to fruition in 1906. *See* 1906 Treaty.

Section 8 of the Reclamation Act of 1902 defers to state law for the "control, appropriation, use or distribution of water". Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902). This meant the U.S. Bureau of Reclamation had to obtain a right to use the waters of the Rio Grande from the State of New Mexico for the development of the Rio Grande Project. Pursuant to Section 8 of the Reclamation Act, the United States acquired its water rights for the Project by filing notice, as required by the laws of the Territory of New Mexico. *Letter from B.M. Hall, Dept. of Int. Reclamation Service Supervising Engineer, to David L. White, Territorial Engineer of New Mexico* (Jan. 23, 1906). The U.S. Bureau of Reclamation provided notice to the territorial engineer of its intent to appropriate "a volume of water equivalent to 730,000 acre-feet per year" which would be diverted from Elephant Butte Reservoir "and diversion dams below." Notice of Intent to Appropriate, *supra.* Two years later, the United States supplemented its appropriation with a claim to "all the unappropriated water of the Rio Grande and its tributaries." *Letter from Louis C.B. Hill, Dept. of Int. Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico* (Apr. 1, 1908).

As discussed, *supra*, EBID is responsible for administration of the New Mexico portion of the Project, under which duty it delivers water to constituents throughout southern New Mexico. After EBID diverts Project water from the river and delivers it to farmlands within the district, a substantial portion of the used water is returned to the river through a drain system that was completed by the United States in 1916. *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas, 1936-1937*, 73, 85 (1938). As a result of the transfer of certain works, also discussed, *supra*, EBID now owns and operates the drain system. The drain system was designed as part of the Project to allow used water to be returned to the river, and thus to be re-diverted and reused several times as the river flows through the Project area. The drains work like all groundwater by flowing in paths just below the surface toward the Rio Grande. The drains are deep enough to intersect the groundwater table, and return flows that seep into them back to the main stem of the Rio Grande. These drain and seepage flows are a vital component of the Project because the drain flows and seepage flows are returned to the river for reuse, thus enabling the Project to (typically) divert significantly more water for irrigation use than is actually released from the storage reservoirs. Thus, seepage and return flows are part of the Project water supply and are essential to the ability to fulfill congressional purposes of the Project.

The Rio Grande Compact governs "the use of the waters of the Rio Grande above Fort Quitman, Texas".

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1939). While physically in New Mexico, the Lower Rio Grande region consisting of the Rio Grande Project is considered part of "Texas" for the purposes of the Compact. The Rio Grande Compact apportions Rio Grande water between two upstream states, Colorado and New Mexico, by requiring Colorado to deliver a specified quantity of water to New Mexico, and apportions the remaining Rio Grande water between New Mexico above the Rio Grande Project and the Project itself, by requiring New Mexico to deliver a specified quantity of water to the Project. The Rio Grande Compact does not apportion water to Texas, but instead apportions water to the Project, which serves users in New Mexico, Texas, and Mexico. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D. N.M. 1983). While certain parties and the Special Master may not strictly agree with *City of El Paso*, there is no dispute that the Rio Grande Compact's vehicle for delivery of water to Texas is the Rio Grande Project. Rep. 204; NM Exceptions Brief at P. 16.

The significance of the Rio Grande Compact is that it requires the State of New Mexico to deliver a certain quantity of water to the Project each year based on the amount of water that passes various gauging stations. The Rio Grande Compact contains no provision for allocation of water among Project beneficiaries and, instead, those arrangements are left to the 1906 Treaty with Mexico and, currently, the 2008 Operating Agreement among the United States, EBID, and EP1.

C. Statement of Interest

Throughout the more than one hundred year history of the Rio Grande Project, EBID has entered into numerous contracts with the United States, and EP1. These contracts form the basis of the operations of the Project, and EBID has an interest in protecting the rights derived from these contracts to ensure the future success of the Project and irrigators in southern New Mexico. EBID has an interest in ensuring contract obligations are met, such as those obligations imposed by the 2008 Operating Agreement, which determines the division of the water between the two irrigation districts once water is determined to be Project water. EBID's compliance with contractual obligations of the New Mexico portion of the Project ensures the ability of irrigators to continue to access Project supply.

The Rio Grande Compact, and EBID's interest thereunder, are unique because, under the Compact, Texas agreed to have water delivered to it at Elephant Butte Reservoir, located approximately 100 miles north of the state border, rather than electing to receive delivery of its share of Compact water at the state line. *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372, 378 (N.M. Ct. App. 1993). Because Rio Grande Compact water is converted to Project water upon delivery to Texas at Elephant Butte Reservoir, and because EBID is responsible for delivery of the New Mexico share of Rio Grande Project water to irrigators within the State of New Mexico (whose predecessors in interest paid for

the New Mexico portion of the Project) and, further, because EBID is responsible for ensuring delivery of EP1 and 1906 Treaty water under the 2008 Operating Agreement, EBID is uniquely situated and is unlike any other party or Amici in this case. EBID has a direct interest in the protection of Project supply via the Rio Grande Compact, Reclamation law, and/or state law.

The central issue in this case is the interference with Project supply by non-Project water users. The difficulty, and controversy that, in part, led to this case, is in determining what qualifies as "tributary" flows and "seepage and return flows" that were historically present within the Project and that must be protected from interference by non-Project water users. These technical issues will be further developed in this case to determine whether the interests of the Project, and thereby Texas, have been compromised by the interception of certain types of water. EBID has an interest in any determination regarding protection of Project supply for purposes of ensuring that its members are not the only water use sector responsible for meeting administrative requirements imposed to avoid harm to the Project. Any such determination should acknowledge that EBID Project water users, though many have groundwater rights that also qualify them as non-Project water users, making them part of the subset of water users who may be using groundwater in a manner that improperly affects the Project, are the only water users who have offset the affects of their groundwater pumping on the Project to date.

SUMMARY OF ARGUMENT

Numerous arguments have been raised regarding what this Court should or should not allow in this case moving forward. Arguments urging this Court to ignore the entire First Interim Report of the Special Master have also been raised in the Exceptions Briefs. Further, some Amici continue to argue for outright dismissal of the case, a position inconsistent with their own parent State. The arguments against adoption of the full First Interim Report of the Special Master and in favor of unnecessarily restricting the future development of this Original Action should not be entertained by this Court for the reasons stated below.

Specifically, this Court should not be swayed by arguments regarding *Colorado River* abstention for three reasons. First, the Lower Rio Grande Stream Adjudication case does not present issues of abstention because the stream adjudication court has recognized that it does not have the authority to determine administration issues. Second, the Office of the New Mexico State Engineer has a conflict of interest that would prohibit it from entertaining the administration issues raised in this case. Third, there is no risk of re-litigating issues determined by the stream adjudication court, and instead, the Parties and Amici making this argument only do so out of fear of reaching the merits of the issues in this case, rather than in a forum they have more control over. Finally, the arguments in favor of altogether avoiding adoption of the First

Interim Report of the Special Master rely on an incorrect understanding of the procedural posture of this case.

ARGUMENT

A. THE UNITED STATES SUPREME COURT IS THE CORRECT FORUM AND THERE ARE NO *COLORADO RIVER* ABSTENTION ISSUES

The State of New Mexico and some Amici have raised questions regarding the *Colorado River* Abstention Doctrine, as applied to the ongoing Lower Rio Grande Stream Adjudication pending in the Third Judicial District Court for the State of New Mexico, to suggest that this proceeding may not be appropriate. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). In fact, their arguments only speak in terms of "potential" conflict between this case and the stream adjudication court, which, as discussed below, is because there are no actual abstention issues raised by moving forward with this case and, specifically, with moving forward to a determination of whether the Project has suffered harm as a result of action, or inaction, by the State of New Mexico. In this stream system, the Rio Grande Compact and the Rio Grande Project are so interconnected, as are the surface water and groundwater of the Lower Rio Grande, that it would not make sense to avoid a determination of claims of harm to the Project on the basis that such a determination may impact a pending

stream adjudication charged with determining the parameters of the Project water right. Because no conflict exists, this case should proceed to a determination on the merits.

1. The Lower Rio Grande Stream Adjudication Court Has Stated That it Lacks Statutory Authority to Decide the Administration Issues Raised by this Original Action as Part of the Adjudication Process

In 1986, EBID brought an action in New Mexico state court requesting the adjudication of all water users in the Lower Rio Grande. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.) ("Lower Rio Grande Stream Adjudication").[3] While the action was initially opposed by both the State of New Mexico and the United States, after several years of litigation regarding whether the case could move forward and whether the United States was to be included, the procedural issues were eventually sorted out and the Lower Rio Grande Stream Adjudication proceeded to begin addressing substantive issues. Throughout the last five years, the stream adjudication court has focused on the rights of the United States in the Project. Recently, the presiding judge in the stream adjudication case issued Findings of Fact

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[3] Lower Rio Grande Adjudication, SS-97-104; US Interest (Reverse Chronological Order), https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx (online docket) (last visited July 24, 2017).

and Conclusions of Law following trial regarding the priority date of the United States' Project right, in which he concluded that the Rio Grande Project carries a priority date under state law of no later than March 1, 1903, thus wrapping up a significant portion of litigation regarding the United States' Project right. EBID has approximately 6,700 members whose interests it is currently representing in the pending stream adjudication case.

The State of New Mexico has argued that the pending Lower Rio Grande Stream Adjudication has determined "all significant aspects of the Project water right". NM Exceptions Brief at P. 42. However, the State of New Mexico further argues the First Interim Report of the Special Master suggests (without saying) that the United States' water right must be adjudicated in this proceeding; therefore, the State of New Mexico urges this Court to limit the United States' participation in this case such that it not be allowed to "re-litigate" its claims already settled by the stream adjudication court. Other Amici have suggested that the correct approach to address this perceived problem would be to dismiss this action altogether, despite the fact that no party has suggested such a solution and each party has acceded to the determination of the Special Master that this case should proceed.

Of particular importance here is the position of the stream adjudication court regarding what constitutes "adjudication" versus "administration". In 2012, the parties participating in the Lower Rio Grande Stream Adjudication briefed the issue of what constitutes the

"source or sources" of Project supply, as the United States claimed an interest in groundwater as part of the Project supply. While EBID believes it is important to clearly define each of the sources and quantities making up the Project supply, the issue came down to a determination of whether this particular request to include groundwater as a source of Project supply of water constituted defining one's water right consistent with what is done in a state stream adjudication, or whether this qualified more as an administrative issue for determination upon a finding of harm to the Project by junior water users. The stream adjudication court determined the latter to be the situation.

While recognizing that reuse of water by capture of seepage and return flows is an essential part of the Project, as with any other Reclamation Project in the Western United States, the stream adjudication court determined that the United States did not state a claim to "groundwater" on that basis, therefore it declined to recognize a "groundwater" right of the United States. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.), filed Aug. 16, 2012 at 6-7. Despite declining to recognize groundwater as a source of supply for the Project, though simultaneously recognizing the importance of seepage and return flows as a source of supply, the stream adjudication court determined that

the exact quantity the United States and its beneficiaries is entitled to protect as seepage and return flows is a fact-specific determination to be made in a different forum. In ordering that the issue was not proper for a determination by the state adjudication court, as *Amicus Curiae* the City of Las Cruces correctly noted in its Exceptions Brief at P. 11, the court left "the determination of whether Project water retains its identification to administrative proceedings conducted before the State Engineer." *Id.* at 7.

The stream adjudication court, however, did determine that the elements of the United States' water right could be defined under applicable New Mexico law, without specifically setting the quantity of seepage and return flows the United States was entitled to protect from depletion by other water users. Thus, the stream adjudication court's decision left the determination of how much water constitutes Project water to a different forum, which it described as an "administrative proceeding conducted before the [New Mexico] State Engineer." Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.), filed Aug. 16, 2012 at 7. In other words, the stream adjudication court decided that the language of the New Mexico adjudication statute regarding the information that must be included in a water rights decree did not require a determination of when and how to protect tributary waters of the Rio

Grande or seepage and return flows of the Project. *Id* ("The scope of the adjudication, in contrast, is more limited, focusing on defining the elements of the right. NMSA 1978 §72-4-19 (1907), stating that an adjudication decree shall declare, as to the water right adjudicated to each party, the priority, amount, purpose, periods and place of use, and as to water use for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.") (internal quotation marks omitted). The stream adjudication court specifically said such an inquiry would be technical and fact specific, and was therefore more appropriate for another forum. The stream adjudication court's determination that it did not have to decide issues related to quantity of seepage and return flows to be protected for the Project was a determination that there are no abstention concerns if this Original Action moves forward. As such, this case should proceed.

2. The New Mexico Office of the State Engineer Has a Conflict of Interest That Would Prevent it from Making Administrative Determinations Regarding Protection of the Rio Grande Project

In New Mexico, the agency known as the Office of the State Engineer is responsible for managing the State's water uses to ensure that the principles of prior appropriation are met. The New Mexico Statutes dictate that the State Engineer shall have "general

supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." New Mexico Statutes, ch. 73, Art. 2, §72-2-1 (1978). More specifically, "the State Engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts." New Mexico Statutes, ch. 73, Art. 2, §72-2-9 (1978). The State Engineer also has the power to adopt regulations to implement or enforce the statutes he has a duty to administer (including the groundwater statutes). New Mexico Statutes, ch. 73, Art. 2, §72-2-8 (1978). In addition, "any regulation, code or order issued by the State Engineer is presumed to be in proper implementation of the provisions of the water laws administered by him." *Id.* "The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him." *State ex rel. S.E. Reynolds v. Aamodt*, 800 P.2d 1061 (N.M. 1990).

If, following determinations of what constitutes Project supply and whether the State of New Mexico has improperly interfered with Project supply (and thus Texas' Compact share of water), New Mexico is found to have acted or failed to act in a way that has harmed the Project, various remedies are available to curtail New Mexico's interference with the Project, including suspension of its administrative control. Even though the New Mexico Statutes purport to create broad jurisdiction over the public waters of the State, those powers might not be broad enough for the State Engineer to retain control over groundwater within

the Lower Rio Grande area if his actions are contrary to the express purposes of the Rio Grande Compact and the Rio Grande Project.

The State of New Mexico's administrative options, despite being broad in scope according to New Mexico law, are inadequate to address the issues raised here. On the one hand, the State Engineer must administer in a manner that will ensure the appropriate amount of water reaches the Elephant Butte Reservoir as required by the Rio Grande Compact. On the other hand, the State Engineer is also responsible for allowing the development of groundwater in the Lower Rio Grande (the geographic area that encompasses the Project). It is the groundwater users within the Lower Rio Grande that are alleged to be the direct cause of the loss of Project water, and thus the cause of the harm to Texas and the Project. New Mexico Statutes have set up various procedures afforded water right holders to seek protection of their water right from impairment by others. In all such cases, the water right holder must submit to the jurisdiction of the New Mexico Office of the State Engineer if it seeks to protect its water right. Such a process was what was envisioned by the stream adjudication court when it determined that quantifying seepage and return flows was an administrative issue rather than an adjudication issue.

Multiple issues are raised by a conclusion that the State of Texas should be required to protect its Rio Grande Compact interests before the State agency alleged to be responsible for the harm claimed by Texas. Further, EBID has consistently complained across

multiple forums of the lack of administrative procedures necessary to protect the Project water supply, together with the State of New Mexico's continued support of, and bias toward, municipal and industrial users who continue to pump water to the direct detriment of the Project and its beneficiaries. To conclude that the State of New Mexico should retain jurisdiction to determine whether the Project, and thereby Texas, have been harmed by its own actions is contrary to hundreds of years of Compact law. Interference with Project supply is crippling the Project and, specifically, the supply available to EBID given the change in allocation procedures set out in the 2008 Operating Agreement. A New Mexico administrative agency with a history of failure to act cannot possibly be the only place to seek protection of the Rio Grande Project.

Finally, as multiple Amici point out, the New Mexico Office of the State Engineer is in a conflict situation regarding the merits of this case by reason of its duty to the entire State of New Mexico in water rights administration. As discussed, *supra*, the State of New Mexico must comply with the Rio Grande Compact, which was designed to ensure water is delivered to the Rio Grande Project, while the New Mexico Office of the State Engineer has historically allowed the virtually unchecked development of groundwater to the detriment of the Project. While Amici would prefer to see this Original Action dismissed in order to avoid the potential conflict, the opposite solution, the one in which this Original Action proceeds and New Mexico, including the Office of the State Engineer, is divested of its

authority to make administrative determinations regarding the Project, is also a vehicle for avoiding a harmful conflict situation.

The State of New Mexico itself has determined that this Original Action is a more appropriate forum, thereby eliminating the need for further discussion regarding whether Rio Grande Compact states should be required to present their case for harm to the Project and their interests in a New Mexico administrative forum. Given that New Mexico has acceded to allowing this Court to determine the issues raised in the Texas and United States Complaints, no determination must be made at this time regarding the appropriateness of the highly prejudicial nature of the administrative proceedings deferred to by the stream adjudication court. Likewise, this Court should not be swayed by the arguments of Amici that continue to request dismissal of this action altogether, and instead should proceed on the basis of the State of New Mexico's concession that this forum is the correct forum.

3. In Determining Whether the Rio Grande Project, and Thereby Compact Texas, Has Been Harmed by the State of New Mexico, There Is No Actual Risk of Relitigation of Various Issues

It is correct to say that in this Original Action, a determination of what constitutes Project supply is necessary prior to a determination of whether the State of New Mexico has improperly interfered with

the Project supply and thereby breached its Rio Grande Compact obligations. Some of those parameters have been set by the stream adjudication court already; the remainder it has declined to address. The State of New Mexico argues the United States should not be allowed to re-litigate its water right in this forum, even though it concedes that the United States is seeking a determination regarding the tributary/return flow depletions that are affecting the Project supply. While the State of New Mexico may be correct that the United States cannot "re-litigate" various issues already determined by the stream adjudication court, what must happen here is not a re-litigation of claims as much as it is a development of technical issues the stream adjudication court determined it could not decide.

The State of New Mexico is correct that state courts are the proper location for adjudicating water rights, including that of the United States (NM Exceptions Brief at P. 14), however the stream adjudication court declined to determine whether Project water is being improperly interfered with (intercepted), calling that issue one of administration. Thus, this proceeding cannot possibly interfere with what the stream adjudication court is doing since the adjudication court has declined to hear these technical issues. Even the State of New Mexico now agrees that, to the extent this controversy involves a determination of whether the United States' Project right has been depleted, this is the appropriate forum for hearing said controversy. This Court should not read too much into the State of

New Mexico's argument that a re-litigation of claims may occur, especially since the Special Master has not said as much, and because, if accepted, such an argument could lead to a conclusion that either never allows the litigation of claims of harm to the Project, or would require such litigation to occur in an administrative forum incapable of resolving the ultimate issues.

Any limitation of the future issues in this case would be premature at this time and, instead, this Court should elect to proceed with a full and fair development of all issues necessary to determine if the State of New Mexico has improperly impacted Texas and the Rio Grande Project. If the State of New Mexico is taking water from the Project, it is taking water from Compact Texas. To the extent that the State of New Mexico is improperly interfering with Project supply, this Court has jurisdiction to enjoin such interference. After more than thirty years of intermittent litigation on this issue, EBID wishes to see the protection of seepage and return flows for the Project, and through the process set up by the Complaints of Texas and the United States, that is exactly what will, and should, happen here.

B. THE FIRST INTERIM REPORT OF THE SPECIAL MASTER SHOULD BE ACCEPTED SUBJECT TO FURTHER DEVELOPMENT OF THE ISSUES DISCUSSED IN THE REPORT

The First Interim Report of the Special Master should not be completely disregarded as certain parties and Amici have suggested. While EBID does not agree wholesale with all findings and conclusions contained in the First Interim Report, and instead EBID believes the Report contains several incorrect statements of fact, the First Interim Report should nonetheless be adopted in whole. However, because of its concerns, EBID reserves its right to address the substantive issues on which there is disagreement at a more appropriate stage of the proceedings. The arguments put forth in favor of disregarding the First Interim Report, either in whole or in part, suggest that the main reason supporting setting aside the Report is that various issues have not yet been completely developed. While there remains work to be done in this case, the First Interim Report of the Special Master should not be disregarded on the basis that the merits have not yet been completely developed. The appropriate course of action is to accept the First Interim Report and its recommendations, subject to further development as necessary and proper to completely address the merits of the case.

1. The Procedural Posture Lends Itself to a Determination That the First Interim Report of the Special Master Is Not a Final Determination of Any of the Claims or Defenses at Issue

Pursuant to Supreme Court Rule 17.2, discussing procedure in an Original Action, the rule states "the form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." Sup. Ct. R. 17.2. Accordingly, the State of New Mexico filed two motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A different standard applies to Motions to Dismiss than applies to Motions for Summary Judgment, and despite the atypical review of historical documents performed by the Special Master, he nonetheless applied the standard for considering Motions to Dismiss. Thus, the Motions to Dismiss were not converted to Motions for Summary Judgment as suggested by various Amici.

Several Federal Courts have discussed the purpose of the Rule 12(b)(6), its standard of review, and the ultimate effect of a determination under the rule, all of which are informative here. First, the Federal District Court for the Western District of Oklahoma in *Briggs v. Oklahoma ex rel. Dep't of Human Servs.*, 472 F. Supp. 2d 1288 (W.D. Okla. 2007) said:

> It is not the objective of Rule 12(b)(6) to formulate issues for trial. That function is discharged by pretrial discovery. Furthermore, the Court's task at this stage "'is not to weigh

> potential evidence that the parties might present at trial,'" *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir.2006) (quoting *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999)), or decide whether Briggs will ultimately prevail against this defendant. Rather, the Court's task is "'to assess whether . . . [Briggs' second amended] complaint alone is legally sufficient to state a claim for which relief may be granted.'" *Id.* (quoting *Sutton*, 173 F.3d at 1236).
>
> *Briggs v. Oklahoma ex rel. Dep't of Human Servs.*, 472 F. Supp. 2d 1288, 1290 (W.D. Okla. 2007).

As this case correctly points out, the function of the court in considering a motion to dismiss is extremely limited.

The Federal District Court for the District of Massachusetts has also provided a comprehensive statement regarding the ultimate effect of a ruling on a motion to dismiss in a situation where the record has not been completely developed. In *Fin. Res. Network, Inc. v. Brown & Brown, Inc.*, 754 F. Supp. 2d 128 (D. Mass. 2010), it said:

> The law of the case doctrine has two branches. *Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 53 (1st Cir.2009); *see Ellis v. United States*, 313 F.3d 636, 646 (1st Cir.2002) (same). This case falls under the more flexible branch. Under that branch, the doctrine constrains "but does not altogether prohibit [] reconsideration of orders within a

single proceeding by a successor judge." *Ellis v. United States*, 313 F.3d at 646 (also explaining policies behind prohibition against reconsideration); *accord Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 25 (1st Cir.1997) ("not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work manifest injustice"). Reconsideration is permissible "if the initial ruling was made on an inadequate record or was designed to be preliminary or tentative[,] . . . there has been a material change in controlling law [or] . . . newly discovered evidence bears on the question." *Ellis v. United States*, 313 F.3d at 647–648. Avoidance of manifest injustice may also provide a basis for reconsideration. *Id.* at 648. Nonetheless, "neither doubt about the correctness" of the first ruling "nor a belief that the litigant may be able to make a more convincing argument the second time around will suffice to justify reconsideration." *Ellis v. United States*, 313 F.3d at 648 (further noting that "there is a meaningful difference between an arguably erroneous ruling . . . and an unreasonable ruling that paves the way for a manifestly unjust result").

Fin. Res. Network, Inc. v. Brown & Brown, Inc., 754 F. Supp. 2d 128, 154-55 (D. Mass. 2010).

That same Massachusetts court went on to explain that:

> The circumstances are more compelling when faced with an initial denial of a motion to dismiss and a subsequent summary judgment motion. A motion to dismiss addresses the plausibility of the claims in the complaint and assumes facts therein as true whereas a motion for summary judgment addresses whether genuine issues of material fact exist to support the claims. A different factual record and a different standard of review govern summary judgment motions. The facts in the Rule 12(b)(6) record while similar are not identical to those in the summary judgment record. A different legal standard of review also applies when assessing the merits of defendants' summary judgment motions. *See McAnaney v. Astoria Financial Corp.*, 2009 WL 3150430, *7 (E.D.N.Y. Sept. 29, 2009) ("because of the divergent standard of review applicable to motions to dismiss and motions for summary judgment, the law of the case doctrine is inapposite to the Court's analysis of whether, after the close of discovery, genuine issues of fact have been raised which survive summary judgment"). Pretrial rulings are oftentimes designed to be preliminary and, as such, a "[d]enial of a motion to dismiss may be followed by an order granting dismissal, or – in the very nature of the difference between a ruling on the pleadings and an examination of the record – an order granting summary judgment." 18B Charles Alan Wright, Arthur R.

Miller and Edward H. Cooper, Federal Practice and Procedure §4478.1 (2nd ed.).

Id. at 155.

The nature of the pending motions is to require the Special Master to make preliminary determinations without the benefit of complete development of the case – the State of New Mexico invited such determinations when it filed its motions to dismiss. We disagree with New Mexico that, after having invited the Special Master to make legal conclusions, which he did, the First Interim Report should not be accepted. The First Interim Report of the Special Master should be accepted, subject to further appropriate legal and factual development as the matter proceeds to trial.

2. The First Interim Report of the Special Master Should Be Accepted by this Court Subject to Further Development of the Substantive Issues as Contemplated by the Federal Rules of Civil Procedure

Future development of the issues will not be hindered by acceptance of the full First Interim Report of the Special Master. The ultimate merits of the case are not currently before this Court, rather, the Special Master's conclusions regarding the four procedural motions are what are pertinent at this moment, and complete development of the issues is yet to come. The State of New Mexico's (and others') arguments that certain conclusions should not be accepted is incorrect and inconsistent with the Rules of Civil Procedure and,

further, there is no need for such a decision. The Amici spend a lot of time putting forward two forms of arguments. First, they make arguments that were fully developed in briefing to the Special Master and which the Special Master has already rejected. Such arguments fall into the category discussed by the Massachusetts Federal District Court, which it labeled "arguably erroneous." *Fin. Res. Network, Inc.*, 754 F. Supp. 2d at 155. The other set of arguments made discuss items that will be further developed when this case moves forward on the merits now that procedural jockeying is almost complete. Both sets of arguments are inappropriate before this Court at this stage, and any issues remaining should first be presented to the Special Master.

The First Interim Report of the Special Master should be accepted as preliminary, and subject to further proceedings as necessary to completely analyze all of the issues raised by the Complaints of Texas and the United States. Full and fair development of the issues is necessary, and the Special Master's First Interim Report and decisions regarding the pending motions should be accepted as preliminary, consistent with case law addressing the Rules of Civil Procedure.

CONCLUSION

EBID has a direct interest in the merits of the claims raised in this Original Action by virtue of its ownership of Rio Grande Project facilities, its interests

in contracts governing the Project functions, and its members' interests in the continued use of both Project supply and groundwater. The First Interim Report of the Special Master should be accepted, and this case should proceed to resolution on the merits. All arguments against the adoption of the First Interim Report, or certain portions of it, should be dismissed, and instead the First Interim Report should be accepted and this case should be allowed to proceed to a full and fair development of the issues.

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Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report of the Special Master

STATE OF COLORADO'S REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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INTRODUCTION

In this brief, the State of Colorado replies only to one set of issues raised in the United States' Exception to the Special Master's First Interim Report and recommendation. Specifically, Colorado addresses the United States' arguments supporting its assertion that it may bring claims under the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. § 37-66-101 ("Río Grande Compact" or "Compact"), to enforce rights that the Compact purportedly grants to the federal government. By focusing on those select issues, Colorado does not imply agreement with other arguments raised by other parties or amici.

SUMMARY OF ARGUMENT

The United States excepted to the Report's recommendation to dismiss its Compact claims. The United States argues this recommendation of dismissal was incorrect because the Compact grants enforceable rights to the United States and obligates the States to protect them. That argument is incorrect for four independent reasons.

First, the rights the United States seeks to vindicate here are based on the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Río Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention"). The Río Grande Compact, however,

strictly disavows having any impact on the 1906 Convention. The United States cannot use the Compact as a means of enforcing the 1906 Convention. The two are legally separate.

Second, although the United States seeks to address through this litigation specific operations of the federal Río Grande Project ("Project") below Elephant Butte Reservoir by the United States Bureau of Reclamation ("Reclamation"), the Compact itself does not contain terms addressing those operations. Instead, the Compact terms regarding the Project relate strictly to and address the relationships among the States of Colorado, New Mexico, and Texas.

Third, no prior decisions of this Court counsel against the Report's recommendation to dismiss the Compact claims of the United States.

And fourth, the United States is not a third party beneficiary to the Compact.

ARGUMENT

The Report correctly recommended the dismissal of the United States' Compact claims. Compacts are agreements among States, negotiated as sovereigns, and subject to the consent of Congress. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-107 (1938). The mere fact that Congress consented to the Río Grande Compact does not allow the United States to claim an inferred protected status

under it. To the contrary, the United States may claim rights under a compact only if those rights appear expressly in the compact's text. Because the Compact here grants no such rights, the United States has no claim to enforce.

I. The Compact does not grant the United States a right of action against the States to enforce deliveries to Mexico under the 1906 Convention.

The United States argues that it has a right of action under the Compact to enforce the delivery provisions of the 1906 Convention. Yet that argument contradicts the plain language of the Compact. Instead of conferring affirmative protective terms on the United States, the Compact specifically *disavows* having any impact on the federal government's international interests.

> Nothing in this compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian tribes, or as impairing the rights of the Indian tribes.

Compact, Art. XVI. Indeed, the Reclamation Act uses similar language to expressly *disavow* federal rights and defer to state water law:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use

> or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof.

Reclamation Act, 43 U.S.C. § 383 (2012). This Court has previously interpreted those provisions to give deference to the separate State water law systems rather than create a new federal obligation to affirmatively protect or enforce them. *California v. United States*, 438 U.S. 645, 665 (1978). So too, the Compact should be read to defer to the separate 1906 Convention, rather than create an affirmative obligation to protect a treaty beyond the States' ability to implement.

The plain language of the Compact, measured against the United States' allegations, makes clear that the claims by the United States pertaining to the 1906 Convention are not based on the Compact itself. The allegations in the United States' Complaint concern delivery of water downstream of Elephant Butte Reservoir. Yet the Compact has nothing to say on the subject. It contains *no terms* implementing the 1906 Convention's delivery of water *from* Elephant Butte Reservoir. Instead, the Compact's provisions keep the 1906 Convention deliveries and Compact allocations independent of one another: "The schedules herein contained and the quantities of water herein allocated

shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico." Compact, Art. XIV. Thus, the quantity of the Compact's allocations among the States are not affected by the implementation of the 1906 Convention's delivery to Mexico.

A separate portion of the Compact emphasizes this point. It defines usable water in the Project as "all water, exclusive of credit water, which is *in project storage* and which is available for release in accordance with irrigation demands, *including deliveries to Mexico*." Compact, Art. I (l) (emphasis added). In other words, the Project water stored in Elephant Butte Reservoir includes the amount necessary for delivery to Mexico and no language in the Compact controls the supply of water available for delivery under the 1906 Convention. These terms, along with the affirmation in Article XVI that the Compact does not affect the 1906 Convention, show that the water allocated by the Compact does not affect deliveries to Mexico, and that the deliveries to Mexico do not alter Compact allocations. Thus the United States' claims regarding delivery obligations to Mexico and Compact allocations among the States remain distinct and separate.

While the United States might be empowered to bring a claim in this Court to enforce the 1906 Convention itself, such an action would arise under the 1906 Convention and not the Compact. *See Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925). The United States incorrectly interprets *Sanitary District of Chicago* as permitting it to bring a Compact claim.

That case, however, held that the United States had standing to enforce an international treaty without resort to any other laws. *Id.* at 425-26. This is consistent with Colorado's briefing on its exceptions to the Report – the United States' claim under the 1906 Convention might be redressable in this Court, but not through a Compact claim. State of Colorado's Exceptions to the First Interim Report of the Special Master at p. 5. The United States' argument that the Compact is the legal basis to enforce its treaty delivery obligations is contrary to existing law.

II. The Compact does not protect the United States' Project operations or give it a right of action against the compacting States.

While the Compact does define the relationship between Project conditions and obligations upstream, its terms are designed to implement the apportionments among the States, not to create separately enforceable federal rights. For example, pursuant to Compact Article VI, a spill from Elephant Butte Reservoir erases debits accrued *by Colorado and New Mexico*. Compact Article VII triggers storage limitations *in Colorado and New Mexico* above Elephant Butte Reservoir when project storage falls below 400,000 acre-feet, unless other conditions exist. Under Compact Article VIII, *Texas* may request release of some storage waters to bring Project storage up to a volume of 600,000 acre-feet by March first.

These portions of the Compact define the *States'* upstream obligations, and relief therefrom, based on volumes of water stored in and released from the Project. To this extent, the conditions within the Project do impact how the States operate under the Compact. But the Compact does not provide protection to the Project itself, for the benefit of the United States. It provides protection to the compacting States in maintaining their apportionment of the Río Grande under the Compact. Nothing in the Compact creates rights enforceable by the United States itself.

III. The cases relied on by the United States do not show that the Report erroneously recommended dismissing its Compact claims.

The interstate compact and equitable apportionment cases cited by the United States do not establish that it has a cause of action to enforce the Río Grande Compact. Instead, those cases show the United States can have separate interests affected by a compact or decree among States. In none of them, however, was the United States seeking relief based on a compact or decree.

For example, in *Texas v. New Mexico*, No. 65, Original, the parties were adjudicating a dispute under the Pecos River Compact. That compact was finalized just a few years after the Río Grande Compact and, like the Río Grande Compact, it expressly did not affect the United States' treaty obligations:

> Nothing in this Compact shall be construed as:
>
> (a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);
>
> (b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters. . . .

Pecos River Compact, ch. 184, 63 Stat. 159, 164-165 (1949), Art. XI. Therefore, just like with the Río Grande, a treaty with Mexico provided grounds apart from the Pecos River Compact for the United States to participate.

This is why the United States' participation in the case was based on its treaty with Mexico, water rights of Indian tribes, and federal lands and facilities. Report of Special Master on Motion of United States for Leave to Intervene as Plaintiff at p. 1, *Texas v. New Mexico*, No. 65, Original (Dec. 30, 1975). The United States did not assert a claim, and the Special Master did not recommend intervention, based on relief afforded under the Pecos River Compact. And this Court did not hold that the compact's language provided the United States with a cause of action. Thus, *Texas v. New Mexico*, No. 65, Original, does not support the United States bringing a compact claim as plaintiff in intervention. It proves the opposite.

The Platte River equitable apportionment litigation presented similar circumstances. In that dispute,

the United States did not bring claims against the States for any apportionment for itself. The Platte River equitable apportionment decree did not allocate water held in storage by Reclamation projects. *Nebraska v. Wyoming*, 325 U.S. 589, 629-630 (1945). However, the combination of federal projects and Court apportionment to the States effectively used the entire river system for irrigation in that area. *Id.* at 651. The United States participated as a defendant in the Platte River apportionment litigation, defending its rights which were not subject to the apportionment decree. *Id.* at 629-630; *Nebraska v. Wyoming*, 304 U.S. 545 (1938). Wyoming's subsequent cross-claim against the United States was not permitted based on Reclamation contracts, but on allegations that the actions of the United States adversely impacted Wyoming's apportionment. *Nebraska v. Wyoming*, 515 U.S. 1, 19 (1995). The Court kept that matter confined to interpretation of the apportionment decree, and the United States did not bring a claim based on it.

Here, the Río Grande Compact allocates the waters of the Río Grande above Ft. Quitman, Texas among the States. Texas makes varying arguments regarding the Compact, but none of them allow for the United States to bring a Compact claim. If the Compact made specific apportionments to Texas and New Mexico below Elephant Butte Reservoir, resolution of the Compact dispute among the States will also dictate the limits of what each of the irrigation districts may receive by contract from the Project. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92,

106-108 (1938); *see also*, Texas Complaint at ¶ 10 ("[The Compact] relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Río Grande Project irrigable lands in southern New Mexico and Texas, to provide the bases of the allocation of the Río Grande waters. . . ."). Conversely, if the contracted deliveries within each State are not controlled by the Compact, Reclamation must follow the water laws of each State in which it operates. Reclamation Act, 43 U.S.C. § 383 (2012); *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); *California v. United States*, 438 U.S. 645, 665 (1978); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *see also* Texas Complaint at ¶ 10 ("The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas. . . ."). Either way, it leaves the United States with no claim of its own under the Río Grande Compact.

IV. The United States does not state a claim as a third party beneficiary to the Río Grande Compact.

The United States claims that it is a third party beneficiary to the Compact.[1] Yet the Compact contains no express or implied provisions making the United States a third party beneficiary. To support this claim,

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[1] This claim was not raised in the United States' complaint, and should be dismissed for that reason.

the United States would have to demonstrate that the States intended to directly, and not only incidentally, benefit it. *See Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001), modified on reh'g, 273 F.3d 1072 (Fed. Cir. 2001); *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). The States did not do so. *Glass* provides the standard for interpreting third party beneficiary status for contracts with the United States. Similar standards exist for each of the Compact States, requiring a third party beneficiary to show the parties to the contract intended to benefit the third party and that the benefit is direct and not an incidental benefit of the contract. *SK Peightal Engineers, Ltd. v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 872 (Colo. 2015); *McKinney v. Davis*, 503 P.2d 332, 353 (N.M. 1972); *First Bank v. Brumitt*, No. 15-0844, 2017 WL 1968830 at *3 (Tex. 2017). The Project was already in operation and the delivery contracts in place before the States finalized the Compact. The States had no intent to create a direct benefit to the United States through the Compact. The United States' Complaint did not allege otherwise. Therefore, the United States is not a third party beneficiary to the Compact with standing to bring its own claims.

The direct benefit of the Compact is to equitably apportion the waters of the Río Grande above Ft. Quitman, Texas among the compacting States. The benefits of the Compact accrue to the water users in each compacting State. As the Report indicates, the United States is not apportioned any water by the Compact. Report at p. 220. In fact, the beneficiaries of the Project, not the United States, put the water to beneficial

use. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945), citing *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937); *see also*, United States' Complaint at ¶ 14 (alleging effects on amount of water available for delivery to irrigation districts and Mexico), and Texas Complaint at ¶ 8 (alleging the irrigation districts are Project beneficiaries because they have delivery contracts with Reclamation). The operation of the Project is meant to deliver water to the beneficiaries; they would incur any harm caused by a water shortfall, not the United States. The allegations of the United States are based on either violation of its delivery contracts or taking water without a contract. United States Complaint at ¶ 13. It alleges that these actions cause harm to its ability to deliver water within the Project. "Consequently, extraction of water that is hydrologically connected to the Río Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico." United States Complaint at ¶ 14. The Project beneficiaries would incur the true injuries. The beneficiaries, however, are adequately represented by their respective States with regard to allocations made under the Compact. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938); Report at p. 223. Therefore, the United States is not a beneficiary of the Compact.

The Court should not interpret the Compact to provide an implied right to sue any of the States as a third party beneficiary. A compact cannot be re-written by courts to add terms. *Texas v. New Mexico*, 462 U.S.

554, 565 (1983). This Court rejected the recommendation to give the United States, a non-party to the compact, a vote when that provision was not included in the Pecos River compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983) ("The Pecos River compact clearly lacks the features of these other compacts, and we are not free to rewrite it"). This reasoning was later followed in *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013), when the Court declined to read absent terms into a compact. This same reasoning applies here. To read into the Compact absent terms subjecting the States to suit based on implied protections is contrary to the line of cases interpreting interstate compacts.

CONCLUSION

The Compact contains no terms reflecting protection of the United States' operation of the Río Grande Project or deliveries under the 1906 Convention. Therefore, the Court should uphold the recommendation of the Report to dismiss the Compact claims of the United States.

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Defendants.

On Exceptions To The First Interim Report Of The Special Master

STATE OF NEW MEXICO'S REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND COLORADO

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PROCEDURAL BACKGROUND

The United States has filed an exception to the recommendation in the First Interim Report ("Report") of the Special Master that the United States' Complaint in Intervention ("U.S. Compl.") be dismissed to the extent that it asserts claims under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"). Exception of the United States and Brief for the United States in Support of Exception ("U.S. Br."). The State of New Mexico opposes the United States' exception.

The State of Colorado has also filed two exceptions to the Report. State of Colorado's Exceptions to the First Interim Report of the Special Master ("Colo. Br."). Colorado argues the Court should limit the claims by the United States to those arising from its interest in the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention") and that the Court should not adopt the findings and conclusions within the First Interim Report as the law of the case. The State of New Mexico does not oppose Colorado's first exception and supports Colorado's second exception.

The State of New Mexico has filed exceptions to statements and implications in the Report that contravene New Mexico's sovereignty and jurisdiction with respect to the adjudication and administration of water within its borders. State of New Mexico's Exceptions to the First Interim Report of the Special

Master and Brief in Support ("N.M. Br."). New Mexico also took exception to any statement or implication in the Report that the United States may litigate in this Court Rio Grande Project ("Project") water rights that have already been or should be determined by the state adjudication court. In addition, New Mexico took exception to the extensive discussion of historical events and reliance on numerous pieces of extrinsic evidence in the Report as premature and unfairly prejudicial at this early stage of the proceedings.

The State of Texas filed no exceptions to the Report. The Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1 did not file amicus briefs or exceptions to the Report. The City of Las Cruces, Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), New Mexico State University ("NMSU"), and New Mexico Pecan Growers each filed an amicus brief.

ARGUMENT

The United States filed a Complaint in Intervention asking the Court to declare that New Mexico, as a party to the Compact, may not permit water users that do not hold a contract with the United States Bureau of Reclamation ("Reclamation") to pump groundwater in the Lower Rio Grande. The United States alleges that such pumping intercepts or interferes with the delivery of water from the Project and seeks an injunction against New Mexico. Report at 218 (citing U.S. Compl. at 5). The Special Master summarized the position of the United States as follows:

> [T]he crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its ability to deliver Project water to its consumers as required by contract or by convention.

Report at 219-20. The Special Master then described his first task:

> As an initial matter, in evaluating whether the United States has stated a plausible claim under the 1938 Compact, I must determine whether the 1938 Compact confers upon the United States the right to assert federal reclamation law claims against quasi-sovereign New Mexico, as the United States itself is not a signatory to that compact and received no apportionment of Rio Grande water through the compact.

Id. at 220. After reviewing the role of the United States in previous interstate actions in the Court's original jurisdiction, *id.* at 220-28, and observing that this was the first time the United States had intervened to allege that it "has a *right protected by [a] Compact*," *id.* at 229 (emphasis in original), the Special Master concluded that the "1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the compact against New Mexico." *Id.* at 231.

The United States filed its exception to the recommendation of the Special Master, arguing that the recommendation should be rejected based on (1) its treaty obligations to Mexico, (2) its contract obligations under the Rio Grande Project, (3) the history of the United States' participation in original jurisdiction interstate water cases, and (4) its view that the United States is a "third-party beneficiary of the Compact insofar as the Compact is viewed as a contract." U.S. Br. at 28-31.

The United States' exception should be overruled. With no constitutional support, the United States seeks to assert for itself an unprecedented role in litigation among states over interstate compacts. Nothing cited by the United States supports its novel position that operating a federal reclamation project gives the United States the ability to bring claims under a compact to which it is not a signatory. The position asserted by the United States in its exception threatens to massively expand the United States' authority over interstate compacts, to the detriment of the States. It also misinterprets the Compact's plain language.

I. The Special Master Correctly Concluded that the United States Cannot State a Compact Claim Against New Mexico.

The United States takes exception to the Special Master's recommendation that the Court dismiss the United States' Complaint in Intervention "to the extent that the United States cannot state a plausible claim under the 1938 Compact." U.S. Br. at 32 (quoting

Report at 237). Although the Special Master also recommends that the Court allow the United States to press its reclamation law claims in this proceeding pursuant to the Court's nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2), Report at 234, the United States contends it has a right of action under the Compact "because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact." U.S. Br. at 34.

While the United States has federal interests in the Lower Rio Grande in New Mexico, namely treaty compliance under the 1906 Convention and operation of a federal reclamation project, the rights of the United States to protect these interests existed independently for decades prior to the ratification of the Compact and do not arise from the Compact. Nothing in the plain language of the Compact, or in any implication from its construction, suggests its negotiators intended for the Compact to add to the preexisting remedies the United States could invoke to protect its federal interests. In arguing that the Compact creates new causes of action for the United States, the United States loses sight of the Compact's fundamental purpose of apportioning the Rio Grande's waters *among the three signatory States*. *See* Compact Preamble.

A. As a non-signatory to the Compact and an entity to which no water was allocated by the Compact, the United States lacks the authority to bring suit under the Compact.

The Special Master recommended that the United States' Complaint in Intervention be dismissed to the extent it asserts claims under the Compact because, as a non-signatory to the Compact and an entity to which no water was apportioned by the Compact, it has no authority to state a claim seeking to enforce the Compact's provisions. Report at 229-31. None of the arguments advanced by the United States in its exception brief refute this logic. Simply put, the Compact does not explicitly create a cause of action on the part of the United States to enforce its terms, nor does the fact that the Compact was initially subject to approval by Congress implicitly create a right in the United States to enforce its terms.

The United States suggests that, because an interstate compact must be approved by Congress and is therefore a federal statute in addition to a contract, the United States necessarily has the authority to seek declaratory and injunctive relief under the Compact with respect to its federal interests that are allegedly harmed by Compact violations. U.S. Br. at 33-34. In support of this argument, the United States references the Compact Clause of the United States Constitution and cites *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981), for the proposition that the "constitutional requirement that Congress must approve interstate compacts

ensures that agreements between States do not infringe on federal interests." U.S. Br. at 34. However, neither the Compact Clause nor *Cuyler* support the argument that Congressional ratification of an interstate compact creates a cause of action that the United States may assert against a signatory State.

The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides in relevant part that "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." As explained by this Court in *Cuyler*, "[t]he requirement of congressional consent is at the heart of the Compact Clause." 449 U.S. at 439. Indeed, "[b]y vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 439-40 (citation omitted). As noted by Justice White, dissenting in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 485 (1978) (footnote omitted): "the requirement that Congress approve a compact is to obtain its political judgment: Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would be better left untouched by state and federal regulation?"

Cuyler makes it clear that the Compact Clause is aimed solely at congressional supervision and approval of interstate compacts *prior* to the time they

become effective. This supervisory power ensures the contents of a proposed agreement between or among States will not infringe upon existing federal interests. However, this power is distinct from an ongoing ability to supervise compact compliance *after* enactment. Nothing in the explicit language of the Compact Clause or the case law interpreting it suggests it was intended to authorize a cause of action by the federal government against compacting States to enforce the terms of the approved compact. The practical effect of the power now claimed by the United States to enforce provisions of compacts to which it is not a signatory would be to enable it to attack provisions or applications of compacts after ratification, even in the absence of any disagreement among the compacting States, and even over the opposition of the compacting States.

The United States cites no precedent for what would amount to such a vast expansion of its powers other than *Cuyler*, but this citation is unavailing. While *Cuyler* confirms that congressional consent necessarily transforms an interstate compact approved subject to the provisions of the Compact Clause into a federal statute, it says nothing about that consent creating an implied authorization for the federal government to bring a claim to enforce provisions of an approved compact. The relevant section of *Cuyler* simply examined whether the compact at issue (the Interstate Agreement on Detainers) is an interstate compact approved by Congress, and thus a federal law subject to federal rather than state construction by the courts. *Cuyler*, 449 U.S. at 438-42. Therefore, the

relevant portion of the case was about whether federal question jurisdiction existed, and had nothing to do with whether the United States could bring a claim pursuant to that compact. Indeed, the plaintiff in *Cuyler* seeking to enforce the provisions of the relevant compact was a prisoner asserting that he had the right to a hearing prior to being transferred to another State's jurisdiction; the United States was not even a party to the case. *Id.* at 437. *Cuyler* does not provide an example of the federal government suing to enforce the provisions of a compact, nor has the United States provided any case law supporting this novel theory.

The United States also implies that, because Congress predicated its consent for the States to negotiate the Compact on the condition that a federal representative participate in the negotiations, it may sue under the Compact to enforce its provisions. U.S. Br. at 34, 47 (citing Act of March 2, 1929, ch. 520, 45 Stat. 1502 ("1929 Act")). The United States contends that "Congress required a federal representative to participate in compact negotiations specifically to ensure that the Compact would protect the United States' obligation to deliver water to Mexico and its investment in and operation of the Rio Grande Project." U.S. Br. at 47 (citing 1929 Act). This is an unwarranted leap of logic without support in the language authorizing the Compact's negotiation, the plain language of the Compact itself, or the governing case law.

The legislation authorizing Colorado and New Mexico to negotiate a compact made no mention of any

specific interests that the United States representative was to ensure were protected. Instead, the authorizing legislation predicated such authorization solely on the "condition that a representative . . . of the United States Government, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into." 1929 Act § 2.[1] This language strongly suggests that the purpose of the inclusion of a United States representative was that Congress wished that representative to provide a federal report to Congress on the negotiations, most likely as part of Congress's deliberations on whether to ratify the Compact. Nothing in this language implies an intent to establish a new federal enforcement mechanism *after* the Compact was ratified.

The United States' argument is even more unpersuasive when the Rio Grande Compact is compared

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[1] In support of its assertion that Congress required a federal representative to participate in compact negotiations specifically to protect the United States' ability to deliver water to Mexico and the Project, the United States also cites page 120 of the Report. U.S. Br. at 34, 47. This page of the Report quotes a statement of the United States representative at the Rio Grande Compact Conference in 1934 confirming his understanding of his role as a nonvoting member of the Compact Commission. Not only does this statement not support the United States' position, but the United States' citation to this evidence, which the Special Master collected *sua sponte*, demonstrates the ineffectiveness of the Special Master's disclaimer that nothing in the Report should be "construed as fact finding." Report at 193. As discussed extensively in New Mexico's exceptions, N.M. Br. at 49-55, the Court should reject the Report's historical discussion and use of evidence gathered outside the normal course of litigation and discovery.

to other compacts, such as the Delaware River Basin Compact, where the United States is an express party and signatory, Act of September 27, 1961, Art. 1.2(h), Pub. L. No. 87-328, 75 Stat. 688 ("Delaware River Basin Compact"). Under that compact, the United States is entitled to appoint a voting member to the Delaware River Basin Commission. *Id.* Arts. 2.2, 2.5. Perhaps most importantly, the compact sets out in detail a number of terms governing the United States' participation in the agreement, *id.* Art. 15, a feature notably absent from the Rio Grande Compact. The Susquehanna River Basin Compact, to which the United States is also a party, has provisions very similar to the Delaware River Basin Compact. Act of December 24, 1970, Pub. L. No. 91-575, 84 Stat. 1509. These agreements sharply contrast with the Rio Grande Compact, demonstrating that where States intend the United States to be a party to a compact or to receive rights protected by a compact, they provide this explicitly. The lack of terms establishing such a role for the United States in the Compact confirms the Compact was not intended to confer any rights or protections on the United States.

B. The United States' right to protect compliance with international treaties existed prior to the Compact and does not arise from the Compact.

Neither the plain language of the Compact nor its framework suggest that the negotiators of the Compact intended for it to add to the preexisting remedies

the United States could invoke to protect the 1906 Convention, which had existed for thirty-two years at the time of the Compact's ratification. The United States has always been able to assert independent causes of action to protect its ability to comply with its treaty obligations, and the Compact created no new remedies or causes of action on behalf of the United States.

The United States nevertheless seeks to create an affirmative cause of action out of Article XVI of the Compact by contending "[t]he Compact . . . expressly protects the United States' obligation to deliver water to Mexico pursuant to the 1906 Treaty, Art. XVI, 53 Stat. 792." U.S. Br. at 47-48. This characterization of Article XVI ignores its plain language. Article XVI states that "[n]othing in this Compact shall be construed as *affecting* the obligations of the United States of America to Mexico under existing treaties" (emphasis added). This article does not create a cause of action regarding the treaty or in any way purport to protect the United States' ability to meet its obligations under the treaty; it merely recognizes that the Compact does not impose any new obligations on the United States with regard to existing treaties or in any way relieve the United States of its obligations with regard to existing treaties. *See also* Compact Art. XIV (providing that the Compact's delivery schedules "shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico").

The United States also cites *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925)

("*Sanitary District*"), and *United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982) ("*Arlington*"), to support its argument that it has a right of action under the Compact to protect its ability to meet its treaty obligations to Mexico. U.S. Br. at 34-35. Neither case involved an interstate compact or the exercise of this Court's original jurisdiction. *Sanitary District* involved a claim for injunction by the United States, alleging that the amount of water being withdrawn from Lake Michigan by a public corporation exceeded the amount that it had been authorized to withdraw pursuant to a permit issued by the Secretary of War. 266 U.S. at 423-24. A withdrawal in such excess amount therefore violated a federal statute that prohibited obstruction to the navigable capacity of any waters of the United States except under the conditions explicitly authorized by the Secretary of War. *Id.* at 428-31. Thus, the United States was not suing to enjoin an alleged violation of an agreement among States to which it was not a party, but rather for a violation of a permit whose terms had been set by the Secretary of War pursuant to authorization by Congress. Although the case touches on the United States' obligation to comply with a 1909 treaty establishing its border with Canada, *id.* at 425-26, the focus of the Court's analysis was the alleged permit violation, as well as the United States' authority to "remove obstructions to interstate and foreign commerce," *id.* at 426-32. The case does not hold that the United States must allege a violation of another federal statute, let alone an interstate compact, to protect its treaty obligations. In fact, Justice Holmes, speaking for the unanimous Court, stated, "The [U.S.] Attorney General by virtue of his office may

bring this proceeding, and no statute is necessary to authorize the suit." *Id.* at 426.

Arlington also did not involve an interstate compact, but instead concerned a dispute over whether a county could tax a building owned by a foreign government to house diplomatic staff. 669 F.2d at 927. The primary issue in the case was whether the United States had standing to sue for an injunction against the county without joining the foreign government. *Id.* at 928. The court ruled the United States "can sue to enforce its policies and laws," which includes "its treaty obligations to a foreign state," "even when it has no pecuniary interest in the controversy." *Id.* at 929. Rather than holding that the United States must allege a violation of some other statute to enforce its treaty obligations, *Arlington* suggests that the United States has an independent right of action to protect treaties like the 1906 Convention because it has standing "to enforce its laws and policies." *Id.* It in no way suggests that the existence of a treaty obligation confers standing on the United States to sue to enforce laws, including compacts, under which it otherwise would have no right of action.

To be clear, New Mexico does not contend that the United States has no ability to raise a claim based on the 1906 Convention. If the United States believes the actions of any water users are impairing its treaty obligations, it may assert claims based on the 1906 Convention. However, these claims are not Compact claims and should not be treated as such.

C. The United States' right to protect Project operations and its contract obligations existed prior to the Compact and does not arise from the Compact.

Just as the Compact does not protect the United States' ability to meet its treaty obligations to Mexico, it also contains no provisions suggesting the negotiators intended the Compact to add to the United States' reclamation law remedies that had existed for over twenty years at the time of the Compact's ratification. These reclamation law remedies form the basis for the Special Master's recommendation to exercise jurisdiction, to which New Mexico has not objected. The United States has always had remedies to protect Project operations under reclamation law. The Compact did not silently add new remedies, and remedies should not be imputed by this Court from the Compact's silence.

The United States claims "Project operations . . . are protected by the Compact." U.S. Br. at 39. Because the Special Master concluded New Mexico "relinquish[es] control of the water" by delivering water to Elephant Butte, the United States argues the "Compact protects the United States' ability to" operate the Project and therefore, the United States can raise not just reclamation law claims, but also Compact claims. *Id.* at 34 (citing Report at 195-97). This is incorrect. As more fully explained in New Mexico's exceptions, this delivery obligation does not strip New Mexico of the

ability to adjudicate and administer water within its borders. *See* N.M. Br. at 16-42.

Further, the United States misinterprets the purpose of Compact provisions requiring delivery of water to Elephant Butte.[2] These delivery provisions are intended simply to implement the equitable apportionment among the States. As the Special Master appropriately recognized, the States relied on the Project for their own ends, not to benefit the United States. Report at 230-31. The Compact's purpose is to "effect[] an equitable apportionment" and "remove all causes of present and future controversy among [the compacting] States." Compact Preamble. The Compact is silent

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[2] The United States also wrongly describes certain Articles of the Compact. For example, the United States claims that Article VI of the Compact "establishes limits on the total amount of credits and debits that an upstream State may accrue," U.S. Br. at 15, but in fact the Compact does not limit the amount of accrued credits. Further, the United States' description of Article VIII is incomplete. U.S. Br. at 16. The United States indicates that Colorado and New Mexico are required, upon demand from Texas, to release water up to their respective accrued debit(s) to Elephant Butte Reservoir to provide for a Project release of 790,000 acre-feet that year. This is not the Compact requirement. Under Article VIII the upstream States, if called on by Texas *or New Mexico* in January, are required to release water from storage in post-1929 reservoirs upstream of Elephant Butte, but only to the extent of their accrued debit (as defined in Article I), and only in an amount sufficient, with any other natural inflow, to bring project storage to 600,000 acre-feet by March 1 and keep it at that level until April 30.

regarding the United States' operations of the Project after delivery into Elephant Butte Reservoir.

Specifically, New Mexico's delivery obligation in Article IV ensures specified quantities of water reach Elephant Butte Reservoir, subject to allowed debits and credits in Article VI. Article IV does not require New Mexico "to deliver water into 'project storage,'" as the United States asserts, U.S. Br. at 39 (alterations omitted), but instead requires New Mexico "to deliver water in the Rio Grande into Elephant Butte Reservoir," Compact Art. IV.[3] Article IV says nothing about Project operations, or specific uses of water below Elephant Butte. Nor does the Compact, in Article IV, Article I(k), or anywhere else, designate all water delivered to Elephant Butte as "usable water," as defined in Article I(l). Article I(l) excludes credit water, and further states that "usable water" includes only water "available for release in accordance with irrigation demands including deliveries to Mexico." Water delivered to Elephant Butte can, therefore, be usable water allocated under the Project, credit water subject to relinquishment by upstream states, or even New Mexico's San Juan-Chama Project water. Additionally, Article I(l) confers no rights on the United States and says nothing about the United States assuming sole jurisdiction over usable water, let alone all Rio Grande water below

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[3] As amended by the Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

Elephant Butte. These Compact terms create no protections for the United States and do not give it the ability to raise a Compact claim.

Nor do other Compact provisions address Project operations. Article II establishes no gaging stations downstream of the river gage below Caballo Dam. Articles VII and VIII help ensure water reaches Elephant Butte under certain specified conditions but say nothing about the uses or disposition of water below the reservoir. Article XII, which establishes the Rio Grande Compact Commission ("Commission"), specifically states that, while the United States may designate a representative to sit on the Commission, any federal representative shall be "without vote." If the Compact had been intended to be an avenue by which the United States could bring suit to affirmatively protect federal interests, it is likely that the United States would have been granted a vote on the Commission. The fact it was not confirms that the Compact does not protect the United States' operation of the Project or any other federal interest.

Again, the Project had been in operation for twenty-two years (since 1916) by the time the Compact was adopted. Nothing in the Compact's plain language suggests the drafters intended the Compact to add to the remedies already available to the United States under existing reclamation law. Had they intended to do so, the drafters would have added the United States' compact enforcement explicitly, but they did not. The Court should not impute such remedies from the Compact's silence.

1. The United States' participation in other original actions does not support its right to raise Compact claims in this case.

The original action cases cited by the United States where it has participated as a plaintiff do not demonstrate that the United States has been allowed to raise compact enforcement claims in other cases. As noted by the Special Master, the United States frequently participates in original actions before this Court, but it typically does so as an *amicus curiae*. Report at 220 (citing *Kansas v. Nebraska*, 562 U.S. 820 (2010); *Montana v. Wyoming*, 550 U.S. 932 (2007); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922)). This includes cases where the United States operates bi-state federal reclamation projects that present equities similar to the present dispute.

For example, in the Republican River Compact litigation, No. 126, Original, Kansas sued Nebraska and Colorado alleging violations of that compact in a basin with nine federal reservoirs operated by Reclamation and the U.S. Army Corps of Engineers ("Corps"). *Kansas v. Nebraska*, 135 S. Ct. 1042, 1049 (2015). These federal projects included the Bostwick Division of Reclamation's Missouri River Basin Project ("Bostwick Project"), an interstate project delivering water allocated by the Republican River Compact. Water stored in the Bostwick Project's Harlan County Reservoir is released to meet irrigation demands in both Nebraska and Kansas. *See* Second Report of the Special Master (Subject: Final Settlement Stipulation) at 4-10 and Apps.

C1, C2 (Maps), *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Apr. 16, 2003). The United States supported Kansas' Motion for Leave to File, but, despite the presence of numerous federal projects, including a major project for implementing that compact by delivering irrigation water to the lower part of the upstream State and to the downstream State, the United States did not intervene, but participated as *amicus curiae* only. *See* Brief for the United States as Amicus Curiae on Mot. for Leave to File Bill of Compl. 11-16, *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Dec. 18, 1998). Significantly, the United States did not assert a compact claim against the upstream State alleged to be depleting the federal reservoir project water essential for the delivery of compact allocations. This is so, even though the central Reclamation project distributing the compact waters was alleged to be suffering significant depletions of project inflows. *See* Kansas' Reply to Nebraska's Br. in Opp. to Mot. for Leave to File, App. A, *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Aug. 7, 1998) (Graph showing Projected vs. Actual Harlan County Reservoir Inflows, based on Reclamation sources).

Yet in the present case concerning enforcement of the Rio Grande Compact, which also involves a bi-state Reclamation project delivering water apportioned between the states, the United States is asserting a compact claim for the first time. There is no distinction between the two compacts that would produce a compact claim under the Rio Grande Compact and not

under the Republican River Compact. In short, although the United States was previously involved in a dispute with very similar circumstances, it never asserted the authority to bring independent compact claims, or even intimated that it believed it had a compact cause of action.

Even when the United States has intervened as a *party*, whether it is aligned as a plaintiff or a defendant, it has done so simply to protect other federal interests, not to assert a new cause of action arising from a compact. *E.g.*, *Kansas v. Colorado*, 533 U.S. 1, 6 (2001). For example, in its Complaint in Intervention in a dispute over the Pecos River Compact, after describing its existing rights and obligations regarding tribes, national forests, parks and monuments, Reclamation projects and other federal water rights, the United States simply requested "such relief as is appropriate and necessary to protect the United States' rights with respect to the waters of the Pecos River stream system." U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Support at 9, *Texas v. New Mexico*, No. 65, Original (filed Aug. 25, 1975). The memorandum in support of the motion to intervene concluded, "intervention is appropriate to insure that the federal interests are fully protected." *Id.* at 11. It is clear that the United States did not

assert any cause of action arising out of the Pecos River Compact, but merely intervened to protect federal interests in the basin.[4]

A further example is the intervention of the United States in the Arkansas River litigation, *Kansas v. Colorado*, No. 105, Original. In that case, Kansas alleged violation of the Arkansas River Compact by Colorado. The Arkansas Basin encompassed by that compact includes the U.S. Army Corps of Engineers' John Martin Reservoir Project, which delivers irrigation water to lands in both States. Reclamation operates two projects wholly within Colorado as part of this interstate river system, the Fryingpan-Arkansas Project and the Trinidad Project. The United States moved to intervene as a party defendant "to defend the federal interests raised by the Complaint filed by the State of Kansas and the Answer and Counterclaim filed by the State of Colorado." Mot. of the U.S. for Leave to Intervene as Party Def. at 1, *Kansas v. Colorado*, No. 105, Original (filed Jan. 30, 1989). The United States' Motion to Intervene was accompanied by a Stipulation for

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[4] The United States also argues it was allowed to intervene in *Texas v. New Mexico*, No. 65, Original, to protect its obligations under a separate treaty with Mexico, but this case does not support its position. The United States asserted in its motion to intervene in that case that its "international responsibility to assure deliveries to the Republic of Mexico" supported its intervention. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas v. New Mexico*, No. 65, Original (filed Aug. 1975). This demonstrates only that the United States had an interest in protecting its treaty obligation, not that it had or asserted claims under the Pecos River Compact based on its treaty obligation.

Intervention signed by the two States, stating that the "federal interests appear to be limited to and involve the Fryingpan-Arkansas Project (Pueblo Dam and Reservoir) and the Trinidad Project." *Id.* at 3. The special master granted the Motion to allow the "United States to represent the federal interests raised by the Kansas complaint and the answer and counterclaim filed by Colorado." 1 Report of the Special Master at 24, *Kansas v. Colorado*, No. 105, Original (filed July 29, 1994). The United States did not file a counterclaim, but requested "that the Court issue an order protecting the rights of the United States in the Trinidad Project and the Fryingpan-Arkansas Project, and for such other and further relief as the Court may deem just and proper." Ans. of U.S. at 4, *Kansas v. Colorado*, No. 105, Original (filed Jan. 30, 1989). The United States was defending against the claim by Kansas that Colorado had been causing two federal projects to be operated in violation of the Arkansas River Compact. There was no suggestion that the United States might have an independent cause of action against either State under the Arkansas River Compact.

In previous litigation involving the Rio Grande Compact itself, the United States has not suggested that the Compact gave it an independent cause of action. The United States intervened in *Texas v. Colorado*, No. 29, Original, "to protect its rights in the Rio Grande stream system." U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Support at 4, *Texas v. Colorado*, No. 29, Original (filed

Apr. 19, 1968). The United States did not assert a right of action under the Compact but merely requested that "its rights with respect to the waters of the Rio Grande stream system be fully recognized and protected by the Court." *Id.* at 5. Nor need it assert a right of action under the Compact here. Intervening to protect federal interests under other laws is a very different matter from intervening to assert a cause of action for declaratory and injunctive relief against a compacting State as a compact claim. By attempting this latter novel and radical procedure, it appears the United States seeks to claim for itself a central role in the administration and enforcement of the Compact, as well as the apportionment of water between New Mexico and Texas.[5] The Compact does not contemplate such a role for the United States.

While the United States has been allowed to defend its interests in original jurisdiction lawsuits involving allegations of compact violations, it cites no precedent for its present position that it may raise

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[5] Contrary to the United States' assertion, it is not empowered to make unilateral allocations of water between the States. *See* U.S. Br. at 40 ("The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and thus between the states of New Mexico and Texas, and the United States has a right and obligation protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands."). The Compact assigns no role to the United States to "allocate water . . . between the states of New Mexico and Texas." The Compact's assumption that Project operations would continue as they had prior to its adoption does not confer on the United States any "rights and obligations" under the Compact.

independent claims under a compact, apart from the state signatories to the compact. Allowing the United States to raise independent Compact claims would upset the bargain reached by the compacting States. States appropriately and vehemently guard their compact interests and will seek to vindicate their rights if they feel they are being denied the benefits they bargained for. Granting the United States the ability to raise compact claims as a non-party could result in the United States taking positions or asserting theories at odds with the positions and claims of the actual compacting parties. Nothing in the Compact indicates that the States considered this expansion of federal power as part of their argeement.

2. *Nebraska v. Wyoming* does not support the conclusion that the United States may sue for Compact violations.

The United States argues its participation in various disputes over water administration in the North Platte River Basin confirms that it "may enforce an equitable apportionment decree (and, by analogy, an interstate compact) to protect Reclamation project characteristics that are a necessary predicate to the apportionment of an interstate stream." U.S. Br. at 44 (internal quotation omitted). The United States has misread this case, which is different at its core from the present case.

First, the United States points to a decision the Court entered in 1993, wherein the Court "granted

summary judgment to the United States and Nebraska" on claims related to Reclamation's operation of reservoirs "necessary to ensure the delivery" of water to Nebraska. U.S. Br. at 44 (citing *Nebraska v. Wyoming*, 507 U.S. 584, 587 (1993)). The United States' summary judgment motion in that case was for a determination of the priority date for certain federal reservoirs, the Inland Lakes, which Wyoming argued had not been granted a valid priority under Wyoming law. *Nebraska v. Wyoming*, 507 U.S. at 593-94; Second Interim Report of the Special Master at 16, 22, *Nebraska v. Wyoming*, No. 108, Original (filed Apr. 9, 1992) ("Second *Nebraska* Report").

While the Court characterized the United States' and Nebraska's claims regarding the Inland Lakes as an "enforcement issue," *Nebraska v. Wyoming*, 507 U.S. at 592, this does not demonstrate the United States has free-roving authority to enforce apportionment decrees and interstate compacts as it sees fit. On the contrary, the special master and Court in *Nebraska v. Wyoming* found Wyoming could not challenge the United States' claimed priority date for the Inland Lakes because "the Inland Lakes' priority was determined in the original proceedings." *Id.* at 594. In other words, the United States was able to move for summary judgment in that case because it had a right determined and protected by that decree.

There is no indication in *Nebraska v. Wyoming* that the United States raised any claims under the North Platte Decree that did not implicate rights and protections it was granted by the decree, or that it

raised any other claims at all. *See* Second *Nebraska* Report at 4-8 (summarizing the claims raised). Therefore, the 1993 *Nebraska v. Wyoming* decision does not support the conclusion that the United States may sue to enforce an apportionment decree even where it has no specific rights or protections granted by the decree.

Second, because *Nebraska v. Wyoming* was an equitable apportionment case, the Court had considerably more flexibility to broadly interpret or even modify a prior judicial decision than it does when reviewing an interstate compact. *Compare Nebraska v. Wyoming*, 507 U.S. at 591 (asserting the Court's jurisdiction "to modify the [North Platte] decree to answer unresolved questions and to accommodate changes in conditions" (quotation and alterations omitted)) *with Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different."). Given this difference, the Court's allowance of the United States' summary judgment motion in *Nebraska v. Wyoming* is not relevant to this dispute.

The United States also points out that in a later 1995 decision in the *Nebraska* case, the Court allowed Wyoming to assert a cross-claim against the United States alleging that federal management of reservoirs violated state and federal law and undermined Wyoming's apportionment. U.S. Br. at 44-45 (citing *Nebraska v. Wyoming*, 515 U.S. 1 (1995)). The United States argues that if "a State can bring claims against

the United States under an interstate compact to which the United States is not a party" alleging the United States' actions violate that compact, "then the United States should be permitted to state a claim arising under the Compact where a State undermines the operation of the Compact's equitable apportionment scheme to the detriment of a project owned and operated by the United States." U.S. Br. at 45.

In doing so, the United States again conflates a claim raised under an equitable apportionment decree with a claim raised under a compact. But regardless of whether a decree or compact is at issue, the United States presents no reason to believe it has or should have a reciprocal right to sue a state for violating a compact or decree just because that state can sue the United States for improper operations resulting in a compact or decree violation. *Nebraska v. Wyoming*, 515 U.S. at 16.

Where the United States has no rights protected by compact, as here, it has no basis for raising compact claims. If a State's action or inaction "undermines the operation of the Compact's equitable apportionment scheme," U.S. Br. at 45, the affected States will seek to vindicate their rights, as Texas has done here. If the State's action or inaction harms a federal reclamation project, the United States can protect its interests by bringing claims for violations of reclamation law or other pertinent authorities, as the United States can do here. The United States should not be allowed to raise claims under the Compact, and its exception should be overruled.

II. The United States Is Not a Third-Party Beneficiary of the Compact.

The United States fares no better with its argument that it should be permitted to bring a claim to enforce the Compact because it is an intended third-party beneficiary of the Compact. Third-party beneficiary status is an "exceptional privilege." *Glass v. United States*, 258 F.3d 1349, 1354, *opinion modified on reh'g*, 273 F.3d 1072 (Fed. Cir. 2001) (quoting *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). As the United States correctly recognizes, in order to meet its burden to establish that it is an intended third-party beneficiary with rights to enforce a contract, a non-party to a contract must demonstrate "that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." U.S. Br. at 46 (quoting *Smith v. Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1035 (9th Cir. 2005) (additional citation omitted)).[6] The non-party must also make the showing that the contract in question "reflects an intention to benefit the party directly." *Id.* (quoting *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 533 (2005) (additional citations omitted)). While recognizing this burden, however, the United States fails to meet it.

The Compact does not reflect any express or implied intention of the compacting States to benefit the

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[6] New Mexico does not dispute that the Compact should be construed as a contract and evaluated under the principles of contract law. *See Tarrant Reg'l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2130 (2013).

United States. In fact, the opposite is true as the Compact language addressing the United States simply says there is no intention to alter or affect the United States' preexisting obligations at all. Even if the Compact relies on water stored and delivered under the Project as the mechanism for deliveries to Southern New Mexico and Texas, this does not indicate that the States intended to confer a benefit on the United States that it did not already have. While the Compact ensures that water reaches Elephant Butte Reservoir, this is to benefit New Mexico and Texas, not the United States.[7] The Compact does no more than reflect the *status quo* with respect to the United States, relying on the Project, which had been operating for two decades prior to ratification of the Compact. With respect to the United States, the Compact merely recognizes the existing treaty obligation to Mexico in Article XVI. Article XVI expressly precludes anything in the Compact from being "construed as affecting the obligations of the United States of America to Mexico," making it

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[7] *Cf. Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1212, *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (although contract between Bureau of Reclamation and the operator of a dam benefits irrigators by impounding irrigation water and was undoubtedly entered into with the irrigators in mind, the irrigators are not third-party beneficiaries of the contract because that would open the door to them achieving the same status as the contracting parties, a result not intended by the contract). Similarly, in this instance, allowing the United States to assert Compact claims would enable it to achieve a similar status to the compacting States and open the door to it potentially taking inconsistent positions to those parties, a result not contemplated by the Compact.

clear that the Compact confers no benefit on the United States.

The United States has cited no cases where it asserted it was a third-party beneficiary of an interstate compact, let alone where the Court recognized it as one. Nor do the cases cited by the United States for the unremarkable position that the United States may be a third-party beneficiary to an agreement between other parties help demonstrate that it should qualify as a third-party beneficiary under these particular circumstances. If anything, the cases actually undermine the United States' position because they illustrate instances in which the United States was clearly contemplated as a beneficiary of an agreement, unlike the compact at issue. For instance, one of the cases cited by the United States, U.S. Br. at 47, *West Chelsea Buildings v. United States*, 109 Fed. Cl. 5, 16 (2013), involved a Covenant Not to Sue Agreement, as part of the settlement of a dispute between property owners and the City of New York, which explicitly provided that the property owners would not "sue or join any action seeking compensation from . . . the City *or the United States of America*." *Id.* at 12 (emphasis added). The court found that the plain language of the agreement naming the United States and the surrounding circumstances of the settlement demonstrated that the parties intended that the United States would benefit from the promise not to sue. *Id.* at 23-25. The Rio Grande Compact contains no such language.

The United States' citation to *United States v. State Farm Mut. Auto Ins. Co.*, 936 F.2d 206, 207 (5th

Cir. 1991), U.S. Br. at 47, is similarly unavailing. *State Farm* involved the issuance of standard boating and automobile accident insurance policies to military members. *Id.* The court recognized that State Farm was bound under the relevant state law by the policies' terms to reimburse the full costs of medical expenses reasonably incurred in treating its insureds. *Id.* at 210. The court held that, because Congress had legislatively authorized the federal government to recover its costs of medical care provided to military dependents from third-party insurers, the United States was an intended third-party beneficiary of such policies, the same as other medical providers, and that it was simply enforcing rights accruing to it under the terms of the policy and state law. *Id.* at 209-10. This cited case reflects a situation in which the United States is part of a class of clearly intended beneficiaries and stands in direct contrast to the circumstances of the Compact. The Compact's plain language reflects no intention to benefit the United States. Thus, the United States has provided no support for its novel theory that it is an intended third-party beneficiary of the Compact.

III. The United States' Exception Is an Improper Effort to Circumvent State Law.

The United States' insistence on its ability to raise Compact claims, even though this is unnecessary to protect its interests in the Project and its obligations to Mexico under the 1906 Convention, suggests the United States may seek to circumvent New Mexico law

and the rulings of the court in *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. 96-CV-888 (3rd Judicial Dist. Doña Ana County, NM) ("LRG Adjudication"). Moreover, the unprecedented theory that the United States seeks to establish in this case will have significant related consequences in other states. If the United States were to succeed in establishing an independent right to sue under interstate compacts, it could circumvent the state law processes to which the United States is properly subject under the Reclamation Act and other federal law. *See, e.g.*, 43 U.S.C. § 383 (Section 8 of the Reclamation Act of 1902); § 666 (McCarran Amendment). Although this Court has repeatedly held that the United States' water rights are properly determined under state law, *e.g.*, *California v. United States*, 438 U.S. 645 (1978); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the United States has repeatedly sought to evade this clear requirement in the Lower Rio Grande. *See, e.g.*, *United States v. City of Las Cruces*, 289 F.3d 1170, 1189-90 (10th Cir. 2002).[8] The United States seems poised for another attempt to evade New Mexico's consistently recognized jurisdiction over the New Mexico portion of the Project.

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[8] The United States may not now seek a redetermination of the Tenth Circuit's ruling in *City of Las Cruces* upholding the district court's decision to abstain from hearing the United States' quiet title claims in favor of the LRG Adjudication.

The United States should not be allowed to invent a Compact claim in order to avoid state law determinations with which it may be discontented.[9] *See* U.S. Br. at 17-20 (summarizing rulings of the LRG Adjudication court). If the United States is dissatisfied with the LRG Adjudication court's determinations, it can challenge them in the ordinary course of appeal, including, ultimately, a petition for certiorari to this Court.

The LRG Adjudication court's rulings are based on state law and were made after extensive litigation involving the United States and numerous other water rights claimants in the Lower Rio Grande. If the United States were to persuade this Court to review and change those rulings in an original jurisdiction

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[9] As New Mexico explained in its exceptions, N.M. Br. at 40-41, the LRG Adjudication court's ruling on groundwater was based on the United States' failure to ever claim or withdraw groundwater for the Project's use. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, LRG Adjudication (Aug. 16, 2012). The LRG Adjudication court further explained in its order how the United States could protect its surface appropriation from groundwater-induced losses under New Mexico law, *id.* at 4, belying the United States' suggestion that it has no recourse under New Mexico law to protect itself against pumping-induced seepage of surface water into groundwater aquifers. *See* U.S. Br. at 19. As for the LRG Adjudication court declining to rule that the United States has the right to deliver a specified quantity of water to users in Texas, the LRG Adjudication court agreed the United States has the right to deliver water to Texas users, but declined to rule on a specific amount, as calculation of the amount of water available depended on return flows in Texas, a matter outside the court's jurisdiction. Order, LRG Adjudication Court (Feb. 17, 2014).

case under a Compact claim, the interests of these other parties will be affected. This Court would, in effect, need to step into the LRG Adjudication court's role to determine the scope of the Project rights and their relationship to the roughly 16,000 other parties involved in the LRG Adjudication. This Court would also need to apply New Mexico law to determine the scope of those rights.[10] This is a role the Court has historically declined to play. *E.g.*, *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Alternatively, removing the Project rights from the LRG Adjudication without assuming jurisdiction over all other claimants would hamstring the LRG Adjudication court, preventing it from effectively and efficiently resolving the remaining claims to water in the Lower Rio Grande. Allowing the United States to relitigate the rulings of the LRG Adjudication court would also call into question the rulings of the Texas state court adjudication of water rights, which would likewise need to be addressed by this Court.

The amicus briefs filed by New Mexico State University and the City of Las Cruces give some sense of the complexity of the LRG Adjudication as well as the

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[10] The Project rights were appropriated "under New Mexico law," as required by Section 8 of the Reclamation Act, 43 U.S.C. § 383, and as the United States admits. U.S. Br. at 7. It follows therefrom that New Mexico law should determine the scope of the rights so acquired, as Section 8 also requires, regardless of the forum in which this determination is made.

enormous amount of work it has accomplished to date. NMSU Br. at 19-20; Las Cruces Br. at 30-31. The United States presents no compelling reason for the Court to disregard this effort and undertake the arduous task of making these determinations anew. Instead, the Court should overrule the United States' exception to the first Special Master's Report.

IV. The United States' Arguments Regarding Federal Control and the Application of State Law Illustrate the Prejudice Resulting from the Special Master's Premature Findings and Inappropriate Use of Extrinsic Evidence.

New Mexico's exceptions explained how the Special Master's extensive factual discussions and premature determinations based on independent research were likely to prejudice the issues in this case. N.M. Br. at 49-55. Colorado raised similar concerns in its brief, noting that "the parties could be prejudiced by premature statements, based on incomplete information, that may define the States' rights and obligations under the Compact." Colo. Br. at 4-5. The United States' exception, which relies on the premature conclusions from the Special Master, now takes that prejudice out of the theoretical realm and illustrates exactly the problems New Mexico and Colorado anticipated.

For example, the United States relies extensively on the Special Master's flawed interpretation of the Compact to mean that New Mexico silently

"relinquish[ed] control and dominion" of its waters below Elephant Butte Reservoir. U.S. Br. at 23 (quoting Report at 197); *see also* U.S. Br. at 26, 29, 34, 36-37. As discussed in New Mexico's exceptions, to the extent that the Special Master's Report finds that New Mexico relinquished sovereignty over waters within its state boundaries without explicitly agreeing to do so, the Report errs. The United States, however, goes further. It not only relies on the incorrect proposition that New Mexico has been deprived of sovereignty over its waters, but asserts that the United States has then assumed that control. U.S. Br. at 36-37. The United States goes so far as to claim that New Mexico relinquished "the right to allow for the appropriation of [water in the Lower Rio Grande] by the inhabitants of New Mexico under state law." *Id.* at 26. This directly contradicts a significant number of prior rulings by this Court. *See, e.g.*, N.M. Br. at 30-41.

The United States then asserts that New Mexico water users, including groundwater pumpers, must obtain contracts with the United States for any use of water below Elephant Butte. U.S. Br. at 21. The argument amounts, as amicus ABCWUA characterizes it, to a "federalization" of the Lower Rio Grande, ABCWUA Br. at 15-16, something this Court has always unequivocally rejected. *See, e.g.*, *California v. United States*, 438 U.S. at 667 (mandating federal compliance with state water laws in the distribution of water from reclamation projects); *Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1945) (rejecting federal claim to waters of the North Platte River independent of state

law). The United States has taken advantage of the Special Master's overbroad, untested, and unnecessary historical statements to argue for an unprecedented expansion of federal power that has no basis in the Compact.

The United States has also taken advantage of the omissions in the Report's discussion. For example, the Special Master makes no mention of the effect of Texas pumping on the Project, a factual matter that has not yet been subject to discovery. If groundwater pumping in New Mexico impacts Project supply in the manner the United States claims, then Texas pumping must also have an impact. That impact has yet to be determined in this litigation, and is a prime example of the risks associated with premature fact finding without the benefit of an adversarial vetting of the facts. The Special Master and the United States also make no mention of the fact that, if New Mexico water users are required to obtain federal contracts for any use of water below Elephant Butte within the Project area, then Texas water users must necessarily be subject to the same requirement.

The Special Master's Report also omitted any mention of New Mexico's long-established legal scheme of conjunctive management of ground and surface water. *City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1962). This omission enabled the United States to imply that New Mexico law *disregards* the physical connection between ground and surface water. U.S. Br. at 18 (claiming the LRG Adjudication court

"acknowledged that there is an interactive relationship between groundwater and surface water" but "nevertheless recognize[d] surface water and groundwater as distinct entities with distinct administrative schemes" under New Mexico law). The United States goes on to infer from these misleading assertions that, absent the LRG Adjudication court's alleged separation of ground and surface water administration, the United States would, based on its ownership of return flows and seepage, have a claim to all groundwater in the LRG and could require contracts for any groundwater use. This argument misrepresents the ruling of the LRG Adjudication court and conflates surface and groundwater in a way that is unsupported by New Mexico statutes, state and federal case law, and the Compact's express terms.

V. New Mexico Supports Colorado's Exception Recommending that the Court Refrain from Adopting in Totality the Special Master's Report.

Colorado is correct that the Court may exercise jurisdiction under 28 U.S.C. § 1251(b)(2) to consider any claims the United States might wish to raise based on the 1906 Convention. Colo. Br. at 5. New Mexico would not object to that exercise of jurisdiction, although the United States has not sought it so far in this litigation. The Court should reject, however, the United States' effort to characterize claims based on alleged interference with its obligation to deliver water

to Mexico as Compact claims for the reasons given above.

As for Colorado's argument that the United States should be precluded from raising claims other than those arising from the 1906 Convention, Colo. Br. at 5, New Mexico does not oppose this exception. New Mexico has not taken exception to the Special Master's recommendation that, for purposes of judicial economy, the Court extend its nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2) to allow the United States to raise federal reclamation law claims in this proceeding. Report at 234. However, if the Court sustains Colorado's exception, New Mexico agrees with Colorado that resolution of Texas's claims will likely moot the United States' complaint, both because the United States' claims are "nearly identical" to Texas's claims, Colo. Br. at 5, and because the United States seeks only injunctive relief against New Mexico.[11] *See* U.S. Compl. at 5.

For the reasons given in its exceptions, N.M. Br. at 49-55, New Mexico supports Colorado's second exception, requesting that this Court refrain from adopting the findings and conclusions in the Report to permit the parties an opportunity to answer Texas's and the United States' complaints, conduct discovery, present

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[11] To the extent the United States seeks to raise any claims that are unrelated to Texas's claims, granting the United States leave to do so would not promote judicial economy, and the Court should deny any such requests.

evidence, and offer additional arguments. Colo. Br. at 9-10.

CONCLUSION

The Court should overrule the United States' exception.

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim
Report of the Special Master

TEXAS'S REPLY TO EXCEPTIONS TO FIRST INTERIM REPORT OF SPECIAL MASTER

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INTRODUCTION

No Party has taken exception to the Special Master's recommendation that the State of New Mexico's Motion to Dismiss be denied. The State of New Mexico unequivocally states that it "accedes to the recommendation of the Special Master that its Motion to Dismiss Texas's Complaint be denied . . . ." State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support (N.M. Exceptions) at 1. The Motion to Dismiss Texas's Complaint should, therefore, be denied.

Despite the abandonment of its Motion to Dismiss, New Mexico attempts to salvage the arguments upon which its Motion to Dismiss was based by arguing that the Special Master's reasoning in support of the recommendation should be ignored. However, the Special Master's legal conclusions are a necessary prerequisite to his recommended denial of the Motion to Dismiss. Accordingly, the First Interim Report of the Special Master (First Report) should be adopted in full, New Mexico's Motion to Dismiss Texas's Complaint should be denied, the case should move forward, and the Special Master should hear the claims raised by Texas consistent with the Special Master's recommendations.

STATEMENT OF THE CASE

A. Procedural History

In 2013, Texas sought leave to file its complaint against New Mexico, alleging that New Mexico violated its Compact obligations by permitting groundwater pumping and other diversions in New Mexico below Elephant Butte Reservoir depleting Rio Grande Project water intended for use in Texas. Texas Compl. ¶ 4. Texas filed its Motion for Leave to file Bill of Complaint on January 8, 2013. The Supreme Court granted Texas leave to file its complaint on January 27, 2014. At the same time, the Court granted New Mexico leave to file a Motion to Dismiss Texas's Complaint.

On February 27, 2014, the United States moved to intervene as a plaintiff. In its proposed complaint, the United States alleged that groundwater diversions in the Lower Rio Grande intercepted Project water, reducing Project efficiency, violating provisions of reclamation law, and violating provisions of the Compact. United States Complaint in Intervention (U.S. Compl.) ¶¶ 4-7, 12-14. The Court granted the United States leave to intervene on March 31, 2014.

New Mexico moved to dismiss both the Texas and United States complaints on April 30, 2014. After briefing on the Motion to Dismiss was complete, the Court, pursuant to its order of November 3, 2014, referred New Mexico's Motion to Dismiss to the

Special Master. The Court also referred the motions to intervene filed by the Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District No. 1 (EPCWID) to the Special Master. The Special Master heard oral arguments as to New Mexico's Motion to Dismiss and the Motions to Intervene on August 19 and 20, 2015. The Court received the First Report on February 13, 2017. On March 20, 2017, the Court ordered the First Report to be filed and permitted the parties to file exceptions.

B. The Texas Complaint

The Texas Complaint alleges that the Rio Grande Compact (1938 Compact or Compact) was intended to equitably apportion the water of the Rio Grande above Fort Quitman, Texas, among Colorado, New Mexico and Texas. Texas Compl. ¶¶ 3, 18. Because the Rio Grande Project was the vehicle chosen by the 1938 Compact to insure delivery of Texas's apportionment, the 1938 Compact also was intended to protect the operation of the Rio Grande Project. *Id.* ¶¶ 10-12. The Complaint further alleges that New Mexico, contrary to the 1938 Compact, allowed and authorized Rio Grande Project water apportioned to Texas to be depleted through surface diversions and groundwater pumping in New Mexico. *Id.* ¶ 19.

In practice, New Mexico has granted rights, and has otherwise authorized and permitted water users within New Mexico, to intercept return flows and tributary flows below Elephant Butte Reservoir

for use in New Mexico, thereby depriving Texas of water that was apportioned to it. *Id.* Texas alleges that these actions violate New Mexico's obligations under the 1938 Compact, causing injury to Texas and its citizens. Texas Compl. ¶ 25.

C. New Mexico's Motion to Dismiss

In its Motion to Dismiss, New Mexico asserted that Texas's Complaint does not state a claim for relief because Texas failed to identify any express term of the 1938 Compact requiring New Mexico to ensure that water apportioned to Texas reaches the Texas state line. New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention (N.M. Mot.) at 27-40. New Mexico maintained that its only duty under the 1938 Compact is to deliver water into Elephant Butte Reservoir. The fundamental premise of New Mexico's motion is that the plain text of the 1938 Compact is unambiguous and does not support the allegations in Texas's Complaint. *See, e.g.*, N.M. Mot. at 1 ("The plain language of the Compact provides that New Mexico's obligation to Texas is to deliver water to Elephant Butte Reservoir, not to the Texas-New Mexico stateline".). New Mexico contended that Texas's apportionment of Rio Grande water is solely governed by and dependent upon New Mexico state water law. Focusing on Section 8 of the 1902 Reclamation Act, New Mexico argued that the proper forum to resolve Texas's claims was within the New Mexico State Court adjudication of the Lower Rio Grande. N.M. Mot. at 49-58.

New Mexico also moved to dismiss the United States' Complaint in Intervention. New Mexico argued that there is no Compact provision that prohibits New Mexico from interfering with the United States' ability to fulfill obligations to deliver water from the Rio Grande Project. It asserted that water rights below Elephant Butte Reservoir are controlled by state law and the United States, as a water user in New Mexico, must seek remedies under New Mexico state law, in the state court adjudication, for any injury to its water right. New Mexico also urged that if the Court dismissed Texas's claims, the United States' claims should be dismissed because it is not a party to the Compact. N.M. Mot. at 46-64.

D. The Special Master's Recommendation to Deny the Motion to Dismiss Texas's Complaint

Following briefing and argument by the parties, the Special Master issued his First Interim Report on February 9, 2017, recommending that the Supreme Court deny New Mexico's Motion to Dismiss the Texas Complaint as "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact."[1] First Report at 217. In so doing, the Special Master put to rest the fundamental legal argument asserted by New Mexico: that New Mexico has a Compact right to intercept, divert, and deplete

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[1] The Special Master's recommendation on the Motion to Dismiss the United States' Complaint and New Mexico's exceptions to this recommendation are discussed *supra*, at pages 38-41.

water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line because that water and, indeed, the entire administration of the Rio Grande Project within New Mexico, are governed by New Mexico state water law. Based on the Special Master's analysis of the plain, unambiguous language of the 1938 Compact and its structure and design, the Special Master determined that the Compact requires that New Mexico relinquish control and dominion over the distribution of the water delivered into Elephant Butte Reservoir. First Report at 194-198.

E. New Mexico's Exceptions

New Mexico, while acceding to the Special Master's recommendation that its Motion to Dismiss Texas's Complaint be denied, nonetheless takes "exception" to the Special Master's reasoning in support of his recommendation. New Mexico has apparently abandoned its interpretation of Texas's Complaint as alleging that there is a state line delivery obligation. [2] However, New Mexico maintains that its obligations below Elephant Butte Reservoir are defined by New Mexico state law and

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[2] Although New Mexico has abandoned the argument that Texas is advocating for a state line delivery obligation, the argument is nonetheless perpetuated by *amicus curiae*, the City of Las Cruces (Las Cruces) and the Albuquerque Bernalillo County Water Utility Authority (Water Authority). Texas's response to this contention is fully briefed in its opposition to the Motion to Dismiss. *See* Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States Complaint in Intervention (Texas Opp'n) at 21-23, 25-33.

not the 1938 Compact. New Mexico argues that the Special Master's interpretation was in error because, if accepted, the Special Master's interpretation would offend basic concepts of water law. New Mexico asserts that the Special Master's reasoning violates its state sovereignty and contravenes the clear mandate of Section 8 of the Reclamation Act of 1902, which, New Mexico argues, requires that New Mexico law and procedure govern what Texas is entitled to under the 1938 Compact. New Mexico also argues that the Special Master misapplied this Court's "equitable apportionment" jurisprudence. Finally, New Mexico contends that the Special Master inappropriately made evidentiary findings in reaching its recommendations that New Mexico's Motion to Dismiss Texas's Complaint be denied.

F. Motions to Intervene

EBID and the EPCWID each filed Motions to Intervene as parties in the Original Action. All the Parties to the litigation opposed that intervention. The Special Master has recommended that the Motions to Intervene be denied, but has indicated that he will encourage the districts' continued participation as *amici curiae*. Neither the districts nor any of the Parties have taken exception to the Special Master's recommendation that these motions be denied.

STANDARD OF REVIEW

A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." This Court's Rule 12(b)(6) jurisprudence serves as a guide in this case. *See* Sup. Ct R. 17.2.

In evaluating a Rule 12(b)(6) motion to dismiss, a court assumes that the factual allegations in a complaint are true, and draws inferences from those allegations in the light most favorable to plaintiff. A court also construes the complaint liberally. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 572 (2006); *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The Special Master properly articulated and followed the standard of review.

B. Review of a Special Master's Recommendations

The Special Master "is generally charged to 'take such evidence as may be . . . necessary,' and to 'find the facts specially and state separately his conclusions of law thereon.' " *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) (internal

citations omitted). The Supreme Court thereafter conducts an independent *de novo* review of the Special Master's findings, conclusions, and recommendations. *Mississippi v. Arkansas*, 415 U.S. 289, 291-92 (1974). "The findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the Court." *Mississippi v. Louisiana*, 346 U.S. at 862-63.

In considering exceptions to the Special Master's recommendations, the Supreme Court affords "respect and a tacit presumption of correctness" to the Special Master's findings while assuming the ultimate responsibility for deciding all matters. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). "In original cases . . . the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto." *United States v. Raddatz*, 447 U.S. at 683 n.11.

C. Legal Determinations Are Proper When Ruling on a Motion to Dismiss

It is appropriate for the Supreme Court to make legal determinations while resolving a motion to dismiss. *See Montana v. Wyoming*, 563 U.S. 368, 375-89 (2011) (concurring with and adopting the special master's interpretation of Yellowstone River Compact and the nature of the appropriation doctrine in both states on Wyoming's motion to dismiss Montana's complaint); *Maryland v. Louisiana*, 451 U.S. 725, 735-45 (1981) (accepting the special

master's recommendation to deny Louisiana's motion to dismiss and the special master's determinations regarding standing and the exercise of original jurisdiction); *Nebraska v. Wyoming*, 325 U.S. 589, 607-11 (1945) (finding Colorado's motion to dismiss should be denied because the evidence supported the special master's findings that the North Platte River was over-appropriated during the irrigation season); *Arizona v. California*, 283 U.S. 423, 450-64 (1931) (interpreting the Boulder Canyon Project Act on a motion to dismiss and holding that the statute was a valid exercise of congressional power, and that the Act did not abridge Arizona's right to make future appropriations of water).

Additionally, when a compact is unambiguous, as New Mexico argues and concedes in its Motion to Dismiss, it is within the purview of the Court to interpret the compact and rule as a matter of law. *See PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) ("Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and a claim turning on that interpretation may thus be determined . . . ." (internal quotations omitted)); *see also Montana v. Wyoming*, 563 U.S. at 387 (agreeing with the special master's determinations on a motion to dismiss because plain language of the Yellowstone River Compact and the appropriations doctrine allowed Wyoming to improve its irrigation efficiency).

ARGUMENT

A. The Special Master Properly Made Legal Determinations in Response to New Mexico's Motion to Dismiss

New Mexico has abandoned its Motion to Dismiss Texas's Complaint. It nonetheless hopes to eliminate the Special Master's detailed analysis, requesting that the Court reject the Special Master's legal analysis and reasoning in support of his ultimate recommendations. New Mexico alleges that the Special Master's reasoning was in error because he need not have addressed certain issues and doing so exceeded what was necessary to resolve a Rule 12(b)(6) motion. The issues New Mexico focuses upon in its Exceptions, however, were all raised by New Mexico in its Motion to Dismiss. The manner in which New Mexico argued its Motion placed the legal interpretation of the 1938 Compact squarely at issue.

In its Motion to Dismiss, New Mexico argued that Texas failed to state a claim because Texas failed to establish that "any term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas stateline or to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir." N.M. Mot. at 28. It contended that Texas's claim fails because there is no "implied covenant" in the Compact requiring New Mexico to prevent diversion of Project water after New Mexico delivers water to Elephant Butte Reservoir. N.M. Mot. at 36-40. New Mexico insisted

that delivering water into the Rio Grande Project "is not a relinquishment of sovereignty." New Mexico's Reply to Opposition to Motion to Dismiss (N.M. Reply) at 14. New Mexico maintained that state law controls the distribution of water below Elephant Butte Reservoir, that the "legal regime governing the [reclamation] Project was well understood at the time the Compact was executed," and that "the Compact does not expressly or implicitly modify this regime." N.M. Reply at 18. *See also* N.M. Reply at 9 ("Texas and the United States improperly presume that the Compact overrides the mandate in the Reclamation Act of 1902" to defer to state water law).

New Mexico presented these legal arguments to the Special Master, and as the Court asked him to do, the Special Master analyzed the legal arguments and made a recommendation in his First Report. In recommending denying the New Mexico motion, the Special Master explained that he was required to interpret the plain text and structure of the Compact as well as consider the effect of the Compact's equitable apportionment on state law appropriations granted by New Mexico. Contrary to New Mexico's assertion regarding the extent of its delivery obligation, the Special Master concluded that the 1938 Compact requires New Mexico to relinquish control over the water it delivers to Elephant Butte Reservoir. First Report at 195-209. Contrary to New Mexico's assertion regarding the legal regime below Elephant Butte Reservoir, the Special Master concluded that the equitable apportionment achieved by the Compact overrides Congress's command in the

Reclamation Act of 1902 that state law govern the distribution of Compact water. First Report at 210-17. And contrary to New Mexico's assertion that it has total sovereignty over all waters below Elephant Butte Reservoir notwithstanding the existence of the Compact, the Special Master concluded that the doctrine of equitable apportionment governs the apportionment of water between the states and delivery to Texas, not New Mexico law.

In its exceptions to the First Report, New Mexico not only reasserts the significance of these major legal issues, but reargues and repeats the substance of the arguments made in its Motion. In noting "the point" behind its now abandoned Motion, it explains that the reason it brought the Motion was to argue that, "under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that the remedies for any dispute below the reservoir arise under reclamation and state law."[3] N.M. Exceptions at 16, n.7. The Special Master cannot be criticized for directly addressing the "point" of the New Mexico Motion.

The Special Master addressed the legal arguments without resorting to factual allegations or fact findings. He recited the Rule 12(b)(6) standard of review, which required him to assume all factual

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[3] New Mexico's citation, *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), to support its contention that Compact remedies below Elephant Butte Reservoir arise under Reclamation law or state law is not on point because the contention is not supported in the case itself.

allegations from Texas's and the United States' complaints to be true. First Report at 191, 193. Each of his conclusions is legal and can be adopted by this Court. *See Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir. 2009) ("questions of statutory interpretation are questions of law ripe for resolution at the pleadings stage"); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) ("the determination of whether contract language is ambiguous is a question of law"). As noted in his First Report, the Special Master found that:

> If the Court accepts my recommendations, the next step in the case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of the matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties.

First Report at 4. Proceeding as the Special Master recommends will give effect to his prodigious effort leading to his First Report and define the scope of discovery and the remaining issues that will need to be dealt with in this case. *See Chudasama v. Mazda Motor Corp.* 123 F.3d 1353, 1368-69 (11th Cir. 1997) (reasoning that eliminating non-meritorious claims in

a motion to dismiss serves to properly focus the scope of discovery and promotes judicial economy).

Texas requests that this Court accept and adopt the major legal resolutions that are critical to the ultimate resolution of the case that were affirmatively addressed by the Special Master as support for the recommendation that the New Mexico Motion to Dismiss the Texas Complaint be denied. New Mexico should not be able to re-litigate these legal issues at later stages in the litigation simply because it now accedes to the denial of its Motion to Dismiss.

The legal issues that New Mexico continues to assert in its exceptions and that the Special Master recommended be resolved against New Mexico in his First Report are further discussed below.

B. New Mexico's Compact Obligations Are Clear and Unambiguous Based on the Compact Language, and the Special Master's Determination Should Be Upheld

As noted above, New Mexico frames "the point" of its Motion to Dismiss as being: "to argue that under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and [New Mexico] state law . . . ." N.M. Exceptions at 16 n.7. New Mexico's fundamental premise in its Motion to Dismiss was and still is that

the Compact's plain, unambiguous text does not support Texas's Complaint. New Mexico argues that Texas, in its Complaint, failed to identify any express term of the Compact requiring New Mexico to ensure that water apportioned to Texas pursuant to the Compact reaches the Texas state line. New Mexico further contends that Texas failed to identify any express term of the Compact that modifies the "background understanding" and "bedrock principle" that reclamation law, and hence state law, governs the distribution of Project water. N.M. Reply at 11. Notwithstanding the abandonment of its Motion to Dismiss, New Mexico reargues the substance of these points in its Exceptions.

To make a recommendation on the New Mexico Motion to Dismiss, the Special Master was compelled to interpret the plain language of the 1938 Compact. The Special Master started and ended his inquiry by reviewing the four corners of the Compact and concluded that the plain text and structure of the 1938 Compact do not support New Mexico's position. He then provided a provision-by-relevant-provision analysis of the plain text and structure of the Compact, all of which was directly relevant and responsive to the arguments made by New Mexico.

First, he interpreted the plain language of Article IV of the Compact and focused on the operative word "deliver." Using a contemporary definition of that word, he concluded that the 1938 Compact pairs the "obligation . . . to deliver water" with the mandatory term "shall" to connect the duty to

relinquish control with certain volumes of water identified in the delivery schedules.[4] "Thus, the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." First Report at 197. New Mexico's duties to relinquish control of the water at Elephant Butte and refrain from post-Compact depletions of water below Elephant Butte Reservoir do not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact.[5] First Report at 196-98.

The Special Master then analyzed other provisions and the structure of the 1938 Compact and

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[4] This definition of the word "deliver" is identical to how all Parties, including New Mexico, use the same word when explaining its meaning as it relates to Colorado's Article III obligation to deliver water to the Colorado-New Mexico state line.

[5] New Mexico makes oblique reference to *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), regarding purported interpretations of the Compact and its relationship to rights below Elephant Butte Reservoir. *See, e.g.*, N.M. Exceptions at 7, 16 n.7. Texas was not a party to this case, and its sovereign rights were not implicated. Discussion of the Compact by the district court was *dicta*. In that *dicta* related to a jurisdictional defense posed by New Mexico, the district court stated that nothing in its decision meant that New Mexico, having made its delivery to Elephant Butte Reservoir, could undermine that delivery by pumping down the surface flows of the river below the point of delivery. *City of El Paso*, 563 F. Supp. at 386. Notwithstanding that this language was *dicta*, it is certainly consistent with the Special Master's conclusion that New Mexico could not undermine its delivery of water into Elephant Butte Reservoir by allowing downstream pumping.

concluded that the Compact protects releases from Elephant Butte Reservoir in addition to providing for deliveries into Elephant Butte Reservoir. The Special Master noted the definitions of the terms "Usable Water" and "Project Storage" in Article I, as well as the requirement for an annual computation of all credits and debits of Colorado and New Mexico in Article VI. Further, the Special Master described Articles VI, VII, and VIII. Under Article VI, subject to certain qualifications, New Mexico must retain water in storage in reservoirs constructed after 1929. Under Article VII, neither New Mexico nor Colorado shall increase water in storage in reservoirs constructed after 1929 when there is less than 400,000 acre feet of Usable Water in Project Storage, except when actual releases of Usable Water average more than 790,000 acre-feet per year. And under Article VIII, at the beginning of each year, Texas may demand that New Mexico release water from storage in reservoirs constructed after 1929 in the amount of the accrued debits of New Mexico at "the greatest rate practicable" to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March 1 and maintain this quantity so that a normal release of 790,000 acre-feet can be made from Project Storage that year.[6]

The reason the 1938 Compact integrated the Rio Grande Project into its apportionment scheme was that by relying upon the Rio Grande Project, the states would obtain the storage benefits associated with Elephant Butte Reservoir, the return flows from

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[6] *See also* Texas Opp'n at 30-33, 39-40.

the irrigation of lands within New Mexico, and accretions to the Rio Grande below Elephant Butte Reservoir, including tributary groundwater. In 1938, the water of the Rio Grande was fully subscribed, and the only way to ensure that Texas obtained its apportioned water was to include Project water return flows and all tributary flows below Elephant Butte Reservoir in the apportionment calculations. The total supply, used only once, did not meet the needs of New Mexico, Mexico and Texas.

In other words, *more than* the 100 percent of water available at Elephant Butte Reservoir is necessary to meet the full Mexico treaty obligation and the 1938 Compact apportionment. The delivery schedule in Article IV of the 1938 Compact was negotiated and predicated on the quantity of water delivered into Elephant Butte Reservoir being used and reused within the Rio Grande Project, and credit all tributary flows below the Reservoir. Thus, a normal release of 790,000 acre-feet, which the 1938 Compact was designed to protect, results in approximately 950,000 acre-feet that is available for diversion to irrigate Rio Grande Project lands in Texas and New Mexico, and to meet the treaty obligations with Mexico. *See* Texas Opp'n at 12. New Mexico's obligation to "deliver" water to Texas at Elephant Butte Reservoir allowed this to work. The alternative would have been to require New Mexico to release more water from the Middle Rio Grande to make up the deficit that would otherwise have existed in the Texas apportionment. *See* Texas Compl. ¶ 18.

Considering all of these provisions and "interplay between the articles of the 1938 Compact," and "specifically Articles I-IV, VI, VII, and VIII," the Special Master found that the 1938 Compact protects water deliveries to the Project and also "protects the water that is released from Elephant Butte." First Report at 200.

The Special Master confirmed his interpretation of the Compact by measuring New Mexico's arguments against rules of statutory construction:

> [A]cceptance of New Mexico's reading of the 1938 Compact would require me to violate "a cardinal rule of statutory construction" which requires me to avoid construing the Compact in such way that renders entire articles "superfluous, void or insignificant." Indeed, conversely, New Mexico has identified in its pleadings and at oral argument *no* provision of the 1938 Compact that would allow it to recapture water it has delivered to the Rio Grande Project upon release from the Elephant Butte Reservoir.

First Report at 202 (citation omitted). Additionally, the Special Master reasoned that "New Mexico's narrow reading of the Compact also leaves the question of Texas's equitable apportionment under the Compact an open source of controversy." First

Report at 202-03. Recognizing that New Mexico's interpretation of the Compact would defeat the Compact's express purpose, the Special Master rejected New Mexico's "stunted interpretation" of the Compact. First Report at 203.

New Mexico's obligations under the Compact are more than just the delivery schedule in Article IV; they are "woven throughout the 1938 Compact." First Report at 201. As the Special Master recognized, Articles I, II, III, IV, VI, VII, and VIII all control the administration of the Compact, providing for a sufficient amount of water delivered into Elephant Butte Reservoir to achieve a normal release of 790,000 acre-feet, and protecting the release of water from Elephant Butte Reservoir "in order for it to reach its intended destination." First Report at 200. The Special Master's interpretation treats the Compact as a "comprehensive agreement." First Report at 201; *see also id.* at 203 (intending a "holistic reading of the Compact by which each Article is given meaning and purpose"). The Special Master's analysis is consistent with rules of interpretation and should be adopted by the Court. *See* First Report at 192-93 (reciting rules of construction); Texas Opp'n at 16-17 (same).

C. The Special Master Correctly Concluded that the Doctrine of Equitable Apportionment, Not State Law, Controls the Distribution of Water Below Elephant Butte Reservoir

New Mexico is critical of the First Report because New Mexico argues that New Mexico state law should govern how and if water is delivered to Texas. Again, resolution of this question requires the application of law, not facts. New Mexico concedes that Texas received an equitable apportionment of the Rio Grande water through the 1938 Compact. New Mexico also concedes that the signatory States to the 1938 Compact allocated Texas's equitable apportionment to the Rio Grande Project. First Report at 210-11. Notwithstanding these concessions, New Mexico asserts that it may intercept and divert water leaving the Reservoir "before it crosses the New Mexico-Texas state line because that water—and indeed the entire administration for the Rio Grande Project within New Mexico—is governed by New Mexico state water law." First Report at 211. The Special Master properly rejects this assertion as being at odds with the entire legal concept of equitable apportionment by Compact: ". . . New Mexico's argument regarding its duties under the 1938 Compact ignores the effect that equitable apportionment via compact has upon all other prior appropriations granted by state law." First Report at 211.

The Special Master aptly summarized the doctrine of equitable apportionment in the First Report. First Report at 23-31. "Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). "Apportionment calls for the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. 589 at 618. "The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). "[S]trict adherence to the priority rule may not be possible. . . ." *Nebraska v. Wyoming*, 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. at 184 (explaining that "state law is not controlling" in an equitable apportionment and the "just apportionment of interstate waters is a question of federal law that depends 'upon a consideration of the pertinent laws of the contending States and *all other relevant facts*' " (internal citation omitted)). Further, under the doctrine of equitable apportionment, "States have an affirmative duty . . . to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Idaho ex rel. Evans v. Oregon*, 462 U.S at 1025.

When sovereign states accomplish an equitable apportionment by interstate compact, rather than by a judicial decree of the Court, they "bargain[ ] for those rights [under the compact] in the shadow of [the

Court's] equitable apportionment power – that is [the Court's] capacity to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). "Each State's right to invoke the original jurisdiction of th[e] Court [is] an important part of the context in which any compact is made." *Id.* (internal citation and quotation omitted).

Here, the 1938 Compact represents the negotiation and agreement between the "State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State" and "for the purpose of effecting an equitable apportionment." First Report at A-1 (preamble of 1938 Compact). To achieve this equitable apportionment, the Special Master explained that "the 1938 Compact commits the water New Mexico deliver to Elephant Butte Reservoir to the Rio Grande Project." First Report at 211." The apportioned water committed to the Project "is not subject to appropriation or distribution under New Mexico state law. *Id.* "That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication take priority over all other appropriations granted by New Mexico." First Report at 213.

New Mexico's contorted argument that New Mexico state law applies to Texas's Compact apportionment delivered through the Project has always missed the point: the Compact is an equitable

apportionment. An equitable apportionment is different than an intrastate, prior appropriation scheme administered by a single state. This Court has recognized the necessity of invoking and applying equitable principles to interstate stream conflicts between sovereigns as early as 1907 in *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court has consistently applied the doctrine of equitable apportionment in resolving disputes between states, such as this one. *See* First Report at 23-31 (summarizing cases). And the Court has acknowledged the use of its original jurisdiction to enforce the terms of an equitable apportionment achieved by compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1052; First Report at 27-28, 216. The Special Master's determination on this legal issue accounts for this jurisprudence and correctly identifies the legal regime governing the delivery and distribution of Texas's compact apportionment as the doctrine of equitable apportionment, not New Mexico state law.

D. The Special Master Correctly Found That New Mexico's Jurisdiction Below Elephant Butte Reservoir Was Constrained by the Compact

New Mexico has mischaracterized the Special Master's conclusions as stripping New Mexico of jurisdiction below Elephant Butte Reservoir. What the Special Master's actually concluded is that "New Mexico state law does not govern the *distribution* of water apportioned by Compact." First Report at 216 (emphasis added). New Mexico cannot exercise its

jurisdiction in a manner that avoids its Compact obligations by affecting the distribution or delivery of water that has been apportioned to Texas, which, by necessity, includes Rio Grande Project return flows and tributary flows that are needed for Texas to obtain its apportioned water. The Special Master recognized New Mexico's jurisdiction by citing to New Mexico statutes requiring compliance with interstate compact deliveries. First Report at 216 (citing N.M. STAT. ANN. §§ 72-2-9.1(A), 72-14-3.1(B)(6); *Montgomery v. Lomos Altos, Inc.*, 150 P.3d 971, 976 (N.M. 2006) (discussing rules promulgated by the Office of the State Engineer to ensure compliance with compacts, including the 1938 Compact)); *see also* First Report at 214-16 (citing *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914 (Colo. 1983) (*In re Rules and Regulations*) (discussing rules promulgated by Colorado state engineer limiting surface and groundwater use in San Luis Valley to meet Colorado's 1938 Compact obligations)).

New Mexico conflates the Special Master's determination on the equitable apportionment regime below Elephant Butte into an argument that the Special Master's views, if accepted, will crater the foundation of western water law. As explained below, this argument is flawed.

1. New Mexico's Arguments Regarding the Application of Reclamation Law Ignore the Fact There Is a Compact

New Mexico concedes that Texas received an equitable apportionment of the Rio Grande through the Compact and that the Rio Grande Project was the vehicle by which the compacting states chose to deliver that apportioned water. First Report at 210-11. New Mexico then proceeds to ignore the Compact and focus its attention solely on the Rio Grande Reclamation Project and the Project's water rights.

New Mexico presents a history of the Lower Rio Grande where the United States filed for appropriative water rights; the United States built and operated the reclamation Project and then entered into reclamation contracts with irrigation districts for Project water; and once an adjudication of the basin in which the Project was located was initiated, pursuant to the McCarran Amendment, the United States participated in the adjudication to defend the priority of the Project's water rights from junior appropriators. *See, e.g.*, N.M. Exceptions at 35. Grounded in this focus on the Reclamation Project, New Mexico persists in its argument that by operation of Section 8 of the 1902 Reclamation Act,[7]

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[7] The problems with New Mexico's assertions regarding the application of Section 8 of the 1902 Reclamation Act and its interpretation of *California v. United States*, 438 U.S. 645 (1978), are further briefed in Texas's Opposition to the Motion to Dismiss. *See* Texas Opp'n at 56-59.

water stored and released from Elephant Butte Reservoir is subject to administration by the State of New Mexico and subject to New Mexico state law. It further argues that because of Section 8 of the 1902 Reclamation Act and the McCarran Amendment, Texas's sole remedy for redress of its Compact complaints are with the New Mexico State Engineer or the New Mexico Adjudication Court. N.M. Exceptions at 35-42.

What is missing from New Mexico's world view is a recognition that an interstate compact exists and affects the administration of the same water. This failure to recognize the effect of the 1938 Compact is highlighted in New Mexico's Exceptions:

> New Mexico had already been 'delivering' water to the Project for more than two decades when the Compact was adopted. The only change effected by Article IV was to fix the manner in which the amount of water to be delivered to the Project was calculated. There is no indication in the plain language of the Compact that by agreeing to continue something it was already doing, New Mexico agreed to cede its ownership of the water it delivered . . . .

N.M. Exceptions at 21-22. Yet, the existence of the 1938 Compact means that the doctrine of equitable apportionment applies, which takes precedence over ordinary reclamation law, including Section 8 of the

1902 Reclamation Act. The existence of the Compact means that the water available in New Mexico for appropriation by New Mexico citizens is limited to New Mexico's apportionment and does not include the water apportioned to other Compact states. This same effect is true for Colorado. As this Court stated in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*), equitable apportionment by Compact "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Id.* at 106; *see also* First Report at 213.

New Mexico's ignorance of the Compact also explains its treatment of Texas like any other water user in New Mexico. New Mexico has argued that Texas must rely on the priority of the Project's water rights under New Mexico state law, that Texas must enforce those water rights and seek remedy for any injury in New Mexico state venues, and that New Mexico owns the water apportioned to Texas and only granted a usufructory right to the Project. *See, e.g.*, N.M. Exceptions at 38-42, N.M. Mot. To Dismiss at 52-58. These arguments completely disregard that Texas, as a sovereign, is entitled to the equitable apportionment agreed to by three sovereign states and approved by Congress. *See Hinderlider*, 304 U.S. at 105-08 (describing the nature of an equitable apportionment by compact); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) ("The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her

boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained.").

For all these reasons, New Mexico's position is untenable. If its argument were correct, there would be no distinction between the administration of the Lower Rio Grande before and after the effective date of the Compact, and the purpose of the Compact would be completely defeated. The Special Master properly rejected New Mexico's position.

2. New Mexico's Reliance on *Tarrant* Is Misplaced Because the Compact Is Not Silent on Equitable Apportionment

In *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (*Tarrant*), a Texas water district argued it had the right, under the Red River Compact, to cross the state line and appropriate Red River water within Oklahoma's borders for use in Texas. New Mexico asserts that "similar circumstances" are present in this case. N.M. Exceptions at 27. However, Texas does not seek to appropriate water in New Mexico or reach across the border into that state. Rather, Texas only seeks to protect its equitable apportionment, which is delivered through the administration of the Project. There is no violation of any Supreme Court principle concerning state sovereignty.

A compact's express terms are "the best indication of the intent of the parties." *Tarrant*, 133 S. Ct. at 2130. In the instant case, the express terms of the Compact support the Special Master's conclusions. The terms of the Compact provide that three sovereign states agreed to an equitable apportionment of an interstate stream, which Congress approved. Thus, the Compact is not silent on what occurs below Elephant Butte Reservoir. The law of equitable apportionment applies because the Compact expressly apportions Rio Grande water and then used the Project as the "sole method" for distributing that equitable apportionment to New Mexico, Texas, and Mexico. First Report at 201. Likewise, the Compact is not silent on what occurs below Elephant Butte Reservoir when it expressly provides for New Mexico's obligation to "deliver" water at Elephant Butte. Neither New Mexico nor its citizens can take back or attempt to reassert control under state processes over water apportioned to Texas. First Report at 197.

3. *Hinderlider* and *In re Rules & Regulations* Support Texas's Position

Contrary to New Mexico's assertion, the Supreme Court's decision in *Hinderlider*, and the Colorado Supreme Court's decision in *In re Rules &*

Regulations,[8] support the Special Master's ruling and rationale. In *Hinderlider*, the Supreme Court held that Colorado could not confer upon a ditch company, with state decreed rights pre-existing an interstate compact, "rights in excess of Colorado's share of the water of the stream, and its share was only an equitable apportionment thereof." *Hinderlider*, 304 U.S. at 102. The Court further held that "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted water rights before it entered the compact." *Id.* at 106. The equitable apportionment doctrine under *Hinderlider* provides that "state law applies only to the water which has not been committed to other states by equitable apportionment." *Id.* at 106-08; First Report at 206. This holding flatly contradicts New Mexico's position that it may conduct a state law adjudication of rights to water that has already been equitably apportioned under the Rio Grande Compact.

The holding in *In re Rules & Regulations* also contradicts New Mexico's position. In that case, the Colorado Supreme Court upheld Colorado State Engineer rules providing for separate administration of the Conejos and Rio Grande rivers pursuant to the 1938 Compact. The court found that such administration was supported by the plain language of the Compact, which was clear on its face. *In re Rules & Regulations*, 674 P.2d at 925. In the instant

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[8] New Mexico cites to this same case as *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983). Herein, Texas uses the case name as cited by the Special Master.

case, the 1938 Compact's plain language requires New Mexico to "deliver" water into Elephant Butte Reservoir. The language does not support the argument that the water delivered can be both equitably apportioned to Texas under the Compact and also adjudicated for uses under New Mexico state law.

Moreover, the *Hinderlider* and *In re Rules & Regulations* cases are further distinguishable because these cases involved intrastate allocation disputes between parties within Colorado. By contrast, the dispute in the instant case is over interstate apportionment of water between Texas and New Mexico.

Indeed, the overall holding of the *Hinderlider* case that an interstate compact is binding upon the citizens of a state, even where the state conferred water rights under state law before entering into the compact, supports the Special Master's findings and Texas's position in this case. New Mexico does not have the legal authority to administer or adjudicate rights under state law to water that has been equitably apportioned to Texas under the Rio Grande Compact. Once New Mexico has delivered that apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water, as the Special Master properly held.

4. Usufructory Rights Are Subject to Equitable Apportionment

New Mexico argues that the Special Master's interpretation of the Compact improperly ignores the concept of a "usufruct" in water rights law in the manner it defines the word "deliver," presumably arguing that one cannot "deliver" a "use" and that only the state can own a "property" right to water. This argument, however, obfuscates interpretation of the Compact.

That water rights are considered usufructory does not make them any less of a real property interest, or somehow not subject to equitable apportionment. The usufructory nature of water rights is simply a recognition that one cannot own the corpus of the water while it is in the natural stream channel. As this Court has explained:

> While the right to its use . . . may become a property right, yet the water itself, the corpus of the stream, never. . . can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water can be acquired. . . . Neither sovereign nor subject can acquire anything more than a mere usufructory right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops . . . ."

Federal Power Comm'n v. Niagra Mohawk Power Corp., 347 U.S. 239, 247, n.10 (1954) (emphasis added). Consistent with this recognition, New Mexico's constitution provides that "[t]he unappropriated water of every natural stream" within the state is "declared to belong to the public." N.M. CONST. ART. XVI, § 2.

As a matter of interstate compact interpretation, New Mexico's apparent argument, that it has a property right in water and not just a usufruct, treats New Mexico differently than it does Texas. It ignores the clear meaning of the same language in Article III with respect to the "delivery" of water by Colorado to New Mexico. Somehow, under New Mexico's interpretation, New Mexico gets something different from Colorado than what Texas gets from New Mexico. *Compare* N.M. CONST. ART. XVI, §§ 2-3, *with* TEX. WATER CODE §§ 11.021, 11.022. Under the Compact, it does not matter if the water itself or the right to use water is owned by the state to which it has been apportioned. Water apportioned pursuant to a compact, in the amounts specified in the compact, is the property of the respective states by interstate agreement. What each state has is more than a mere right of use pursuant to state law—it is an equitable apportionment. The usufructory nature of water rights throughout the western states does not make for a special case in New Mexico, and nothing about the Special Master's Compact interpretation violates any principle of western water law.

E. The Special Master Did Not Make Factual Findings

New Mexico takes the odd position of accepting the Special Master's determination to deny New Mexico's motion, but not its legal reasoning. This position, and that of the *amici curiae* and the State of Colorado is based, in part, on the argument that the Special Master made factual conclusions based upon his independent analysis of extrinsic materials that were not tested through the evidentiary rigors of a trial.[9] While Texas is not certain why one would want to contest all the background information that the Special Master has provided in his First Report, Texas does not dispute that factual "findings" are subject to trial at the appropriate time in this case.

More importantly, in presenting these arguments, New Mexico, Colorado and the New Mexico *amici* inexcusably ignore the Special Master's express statements that he made no factual findings in making his recommendations and did not rely on the extrinsic materials in making his ultimate recommendations. "[N]othing detailed [in the Report] should be construed as fact finding violative of Fed. R.

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[9] The argument itself is puzzling given the fact that New Mexico lodged almost 900 pages of extrinsic factual and legal materials and relied upon factual assertions in a law review article in support of its Motion. Moreover, it continues to cite extrinsic materials in support of its Exceptions, thus doing exactly what it criticizes the Special Master for doing. See, e.g., N.M. Exceptions at 1, n.1, where New Mexico offers brief factual statements for "context" and then refers to previously lodged materials. This issue is addressed further, *infra*.

Civ. P. 12, as nothing in the historical record was dispositive regarding ultimate recommendations of the report." First Report at 193. All the determinations by the Special Master are based upon a legal review of the plain language and structure of the 1938 Compact, which, citing *Kansas v. Colorado*, 514 U.S. 673 (1995), made unnecessary any factual inquiry into the purpose or history of the 1938 Compact.

Moreover, the Special Master noted that his reference to factual materials and historic documents was solely for the purpose of providing context, consistent with this Court's decision in *Arizona v. California*, 373 U.S. 546, 552 (1963). First Report at 193; *see also* First Report at 8, 32. Unless the Special Master cannot be taken at his word, there are no factual "findings" in the Report.

F. The United States' Complaint

1. The Special Master's Recommendation on New Mexico's Motion to Dismiss the United States' Complaint

Regarding the U.S. Complaint, the Special Master recommends that the Supreme Court rule that the United States cannot state a claim under the 1938 Compact, but that the Court should nevertheless exercise its discretion to extend its original, but not exclusive, jurisdiction under 28 U.S.C. § 1251(b)(2) to

hear the United States' Rio Grande Project claims against New Mexico. First Report at 237.

2. Other Parties' Positions on the Special Master's Recommendations Regarding the United States' Complaint

The United States takes exception to the Special Master's conclusion that its Complaint in Intervention does not state a claim under the Compact, and requests that the Court reject the Special Master's recommendation that its Complaint in Intervention be dismissed. Exception of the United States and Brief in Support of Exception (U.S. Exceptions) at 48. The United States argues that it is entitled to the relief sought because (1) the Compact is a federal statute that protects specific federal interests, namely the United States' ability to fulfill its obligations under its treaty with Mexico, as well as its contracts with EBID and EPCWID; and (2) the United States is an intended third party beneficiary of the Compact. U.S. Exceptions at 28-31. Not addressed in the United States' exceptions is the Special Master's recommendation that the Court utilize its original, but not exclusive, jurisdiction under 28 U.S.C. § 1251(b)(2), to hear the United States' claims against New Mexico, to the extent the United States has stated plausible claims under the 1902 Reclamation Act. First Report at 237.

New Mexico did not file exceptions to the Special Master's conclusion or recommendation with regard to the United States' claims. N.M. Exceptions at 56. However, New Mexico urges the Court to limit the United States' participation in this action to the "narrow questions" posed in the U.S. Complaint related to Reclamation Law. N.M. Exceptions at 57. Although New Mexico acknowledges that the United States' participation "is indispensable to resolution" of the dispute, New Mexico does not want the Court to allow the United States the opportunity to relitigate "settled issues regarding the nature and scope of its Project right." N.M. Exceptions at 56 & n.15.

Colorado's exceptions also assert that the United States' participation be limited, specifically to the United States' claims related to the 1906 Convention with Mexico. State of Colorado's Exceptions to the First Interim Report of the Special Master (Colo. Exceptions) at 5. Colorado did file an exception to the Special Master's recommendation that the Court utilize its original, non-exclusive jurisdiction to decide "other claims that are not based on the 1906 Convention." Colo. Exceptions at 5. Colorado argues that these "other claims . . . are more properly resolved under the rubric of the Compact by the States." Colo. Exceptions at 5.

3. Texas's Position

Texas supports the claims asserted by the United States to the extent they are Compact claims related to the equitable apportionment made

thereunder. As the First Report explains, the Compact utilizes the Rio Grande Project, operated by the United States, "as the single vehicle by which to apportion" Rio Grande water to Texas and New Mexico. First Report at 219. The Rio Grande Project is charged with delivering the Compact's equitable apportionment to Texas and New Mexico. In other words, the United States acts as the "agent" of the Compact, charged with assuring that the Compact's equitable apportionment is, in fact, made. Thus, it would be appropriate for the United States' claims under the Compact to be included in this proceeding, as Project operator, to ensure that apportioned water in Elephant Butte Reservoir is delivered according to the terms of the Compact.

However, to the extent that the United States' Complaint can be read to include claims asserted under Reclamation Law that are distinct from the apportionment achieved by the 1938 Compact, those claims should not be allowed to detract from the claims stated under the Compact. In particular, claims raised under Section 8 of the Reclamation Act are superseded by the Compact and determinations made by the New Mexico Adjudication Court are irrelevant to Texas's Compact claims as well as the Compact claims made by the United States. The Special Master rightfully found that the doctrine of equitable apportionment, sourced in federal common law, governs disputes between states concerning their rights to use the water of an interstate stream. First Report at 25. Therefore, the doctrine of equitable apportionment, not Reclamation Law, governs the

Project's delivery of apportioned water to Texas and New Mexico (i.e., the distribution of water below Elephant Butte Reservoir).

Once all of those Compact issues are resolved by the Special Master and this Court, residual issues, if any, pursuant to Reclamation law can be properly addressed. Reclamation Law related to the Project might involve repayment obligations (which have already been fulfilled), or operation and maintenance obligations imposed on the contractors pursuant to their contracts with the United States. These claims are distinct from the United States' Compact obligation to operate the Rio Grande Project to distribute the water apportioned under the Compact and New Mexico's interference with that obligation.

G. The Arguments Raised by *Amici Curiae* Should Be Rejected

1. The Arguments Raised by Las Cruces and the Water Authority Are Inconsistent with New Mexico's Position and Improperly Introduce Factual Issues

Several *amici curiae* filed briefs in support of New Mexico's positions. As political subdivisions of the State of New Mexico, the *amicus curiae* briefs of Las Cruces and the Water Authority were

automatically filed with the Court.[10] Unlike the State of New Mexico, Las Cruces and the Water Authority argue that this Court should reject the First Report. The positions of these *amici* lack merit.

Both *amici* argue that the Special Master improperly relied on extrinsic evidence and should have made a "narrow ruling" on New Mexico's Motion to Dismiss.[11] *See* City of Las Cruces' *Amicus Curiae* Brief in Support of New Mexico's Exceptions to the First Interim Report of the Special Master (Las Cruces Br.) at 15-20; Water Authority Br. at 16-23. As explained in above, the Special Master ruled on the arguments presented in New Mexico's motion to

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[10] Under Supreme Court Rule 37.4, neither a motion nor Texas's consent is required in order for Las Cruces and the Water Authority to file these briefs. If consent were required, Texas would not have given it. Likewise, if a motion for leave to file were required, Texas would have opposed. The briefs filed by Las Cruces and the Water Authority amount to 78 additional pages of briefing to which Texas must respond, and mostly duplicate New Mexico's arguments regarding the purported application of state law to Texas's apportionment under the 1938 Compact and the Special Master's references to extrinsic materials. The Water Authority's *amicus* brief does, however, underscore and evidence the fact that Compact compliance is a New Mexico state-wide obligation not limited to areas below Elephant Butte Reservoir.

[11] Like New Mexico, *see supra* note 9, at the same time that it criticizes the Special Master for relying on extrinsic materials, the Water Authority cites to extrinsic materials to support its arguments. *See, e.g.*, Albuquerque Bernalillo County Water Utility Authority's *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master (Water Authority Br.) at 26.

dismiss, which required the Special Master to interpret the 1938 Compact and New Mexico's obligations with respect to the delivery of Texas's apportionment. *See supra* pp. 10-15. The Special Master's findings on the legal issues raised in New Mexico's motions were not "premature," as Las Cruces suggests. *See* Las Cruces Br. at 18, 38.

Further, despite its objection to what it considers factual determinations, Las Cruces argues that the Special Master failed to consider the previous lawsuits related to the Lower Rio Grande and that Texas is barred from raising the claims in its Complaint because of its alleged "post decree acquiescence." *See* Las Cruces' Br. at 21-29. This argument amounts to a laches defense. *See Menominee Indian Tribe of Wis. v. United States*, 6514 F.3d 519, 531 (D.C. Cir. 2010) (explaining that the "equitable defense of laches 'is designed to promote diligence and prevent enforcement of stale claims' by those who have 'slumber[ed] on their rights' " (citation omitted)). It is inappropriate to resolve laches claims on a motion to dismiss as the defense typically involves factual issues. *See id.* at 532; *see also Walden v. City of Chicago*, 391 F. Supp. 2d 660, 681 (N.D. Ill. 2005) (listing authorities). Las Cruces is asking the Court to do what it criticizes the Special Master of doing—reach factual issues prematurely on a motion to dismiss.

Additionally, the argument that Texas's claims are barred based on its alleged post-decree acquiescence was neither raised by New Mexico nor

presented to the Special Master during the briefing on the Motion to Dismiss or comments on the draft report. New Mexico never argued that Texas' claim should be dismissed on the ground of "post-decree acquiescence," or other preclusion-based principles. Similarly, New Mexico did not file exceptions to the Special Master's recommendation on New Mexico's Motion to Dismiss the United States' Complaint. *See* N.M. Exceptions at 2-3 (asking the Court to enter order adopting the Special Master's recommendation to extend jurisdiction to the United States' claims while precluding the United States from relitigating its water rights for the Project); *see also id.* at 56-58. Las Cruces and the Water Authority's arguments that are inconsistent with the positions taken by New Mexico are inappropriate. *See New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (although arguments of *amici* and the party are based on the same article of the compact, the court "must pass over the arguments of the named [*amici*] for the reason that . . . the party to the case [ ] has in effect renounced them . . ."); *Eldred v. Ashcroft*, 255 F.3d 849, 850-51 (D.C. Cir. 2001) (declining to reach the merits of the *amicus*'s position which was not raised by the parties to the case).

The Water Authority also argues that the Special Master's findings create a conflict between a flexible delivery obligation upstream of Elephant Butte Reservoir under Articles III, IV, and VI of the 1938 Compact, and what the Water Authority interprets as a fixed state line delivery obligation below Elephant Butte Reservoir. However, the

Special Master's determinations do not affect the delivery schedules in Articles III and IV of the Compact. The Special Master carefully recounted that accounting structure required under the Compact, including the "detailed schedules in Articles III and IV." First Report at 199-200. He found that the "1938 Compact is a comprehensive agreement, the text and structure of which . . . provides a detailed system of accountability to ensure that each State continues to receive its equitable share." First Report at 201.

Likewise, the Special Master did not create a fixed state line delivery obligation below Elephant Butte Reservoir. The Special Master only acknowledged that the Compact was intended to protect the operation of the Project, as Texas alleged in its Complaint. *See, e.g.*, First Report at 195, 198-201. The Water Authority's argument attempts to create a conflict in Compact administration where none exists, and should be rejected by the Court.

2. The Motions for Leave to File and Brief of *Amicus Curiae* New Mexico State University and New Mexico Pecan Growers Should Be Denied

a. Motions for Leave to File *Amicus Curiae* Briefs Are Not Favored

New Mexico State University (NMSU) and New Mexico Pecan Growers (NMPG) each move

separately pursuant to Supreme Court Rule 37.2(b) for leave to file an *amicus curiae* brief in support of New Mexico. Texas was advised of these requests and did not consent to the filing of the briefs. When a party withholds consent, a motion for leave to file an *amicus curiae* brief is a mandatory prerequisite to filing. Pursuant to the express terms of the Rule, "[s]uch a motion is not favored." Rule 37.2(b).

b. Legal Standard for Motion for Leave to File an *Amicus Curiae* Brief

The purpose of an *amicus curiae* brief is to bring relevant matter to the attention of the Court "not already brought to its attention by the parties . . . ." Rule 37.2(a). "An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." *Ibid.* An *amicus curiae* brief should only be allowed by the Court when (1) a party is not represented competently by counsel, or not represented at all; (2) when the *amicus* has an interest in another case that may be affected by the decision in the present case; or (3) "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997).

If a party seeking to appear is perceived to be an interested party or an advocate of one of the parties to the litigation, leave to appear as *amicus curiae* should be denied. *See United States v. Gotti,* 755 F.

Supp. 1157, 1158-59 (E.D.N.Y. 1991). "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. . . the term 'amicus curiae' means friend of the court, not friend of a party." *Ryan,* 125 F.3d at 1063 (citations omitted).

c. The Proposed *Amicus Curiae* Briefs Do Not Meet the Required Legal Standard for Consideration by This Court

NMSU and NMPG fail to articulate any accepted purpose for the Court to burden itself with the consideration of two additional briefs (totaling almost 65 pages) in support of New Mexico's position. Indeed, the content of the briefs by NMSU and NMPG merely restate New Mexico's fully briefed position, offer no unique information or perspective that has not already been raised by New Mexico, and serve only to unnecessarily burden the Court. Perhaps most tellingly, neither NMSU nor NMPG even contest the Special Master's ultimate conclusion that New Mexico's Motion to Dismiss should be denied. NMSU Br. at 3; NMPG Br. at 2. They only take issue with certain aspects of the Special Master's reasoning and join New Mexico in asking this Court to ignore and exclude the comprehensive reasoning upon which the Special Master based his recommendation. Like New Mexico, the NMSU and NMPG briefs devote substantial attention to a discussion of New Mexico's

sovereignty and jurisdiction over water rights, all of which is already fully discussed by New Mexico in its 58-page brief.

NMSU and NMPG claim that the proposed *amicus* briefs would provide perspective into the interests of water rights holders and water users in the State of New Mexico, without articulating any reason why the State of New Mexico does not already adequately represent the interests of these entities consisting of citizens of the State of New Mexico. *See N. Sec. Co. v. United States,* 191 U.S. 555, 556 (1903) ("as the parties are represented by competent counsel, the need of assistance cannot be assumed"). NMSU and NMPG also do not claim to have an interest in any other case which will be affected by the decision of this case. Thus, NMSU and NMPG are effectively only allies of New Mexico. The duplicative arguments in their proposed briefs will have the effect of extending New Mexico's briefing by almost 65-pages. Accordingly, the requests for leave to file the *amicus curiae* briefs should be denied.

To the extent that the Court grants the requested leave to NMSU and NMPG to file the proposed *amicus curiae* briefs, Texas's substantive responses to the arguments are set forth *supra,* at pages 22-35.

CONCLUSION

No Party has taken exception to the Special Master's recommendation that the State of New Mexico's Motion to Dismiss the Texas Complaint be denied. Texas respectfully requests that the Court adopt the First Report, deny New Mexico's Motion to Dismiss Texas's Complaint, and direct the Special Master to proceed to hear the issues raised in the Texas Complaint, consistent with his determination in the First Report.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON EXCEPTIONS BY THE STATES OF NEW MEXICO AND COLORADO TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Special Master concluded that the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, requires New Mexico to totally surrender its sovereignty over water delivered to the Rio Grande Project. (New Mexico Exception No. 1).

2. Whether the Special Master's reasoning is inconsistent with Section 8 of the Reclamation Act, ch. 1093, 32 Stat. 390, which requires federal reclamation projects to comply with state water laws concerning irrigation that do not conflict with specific congressional directives, or the McCarran Amendment (Department of Justice Appropriation Act, 1953), 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights. (New Mexico Exception No. 2).

3. Whether the Special Master concluded that the doctrine of equitable apportionment prohibits the application of New Mexico law to water released from the Rio Grande Project. (New Mexico Exception No. 3).

4. Whether the United States' participation should be limited to seeking relief based on the protection of its obligation to deliver water to Mexico under the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. (Colorado Exception No. 1).

5. Whether the Special Master improperly relied upon documents outside the pleadings. (Colorado Exception No. 2; New Mexico Exception No. 4).

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STATE OF TEXAS, PLAINTIFF

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ON EXCEPTIONS BY THE STATES OF NEW MEXICO AND COLORADO TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

In the First Interim Report of the Special Master (Report or Rep.), issued on February 9, 2017, Special Master A. Gregory Grimsal (Master) recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas in this original action seeking to enforce the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785. The Master further recommended that the Court grant New Mexico's motion to dismiss the United States' complaint in intervention to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law. On June 9, 2017, the United States and the States of New Mexico and Colorado filed exceptions to the Master's Report. The United States submits this brief

in response to the exceptions filed by New Mexico and Colorado.

New Mexico generally accepts the Master's recommendation that its motion to dismiss the complaints filed by Texas and the United States should be denied. N.M. Exceptions 1; N.M. Exceptions Br. 56-57 & n.15. New Mexico contends, however, that the Master's Report "contains analytical errors that threaten to divest New Mexico of sovereignty over water within its borders." N.M. Exceptions Br. 16. New Mexico takes four exceptions to the Report. Specifically, New Mexico takes exception to what it characterizes as (1) the Master's "conclusion that the Compact requires New Mexico to relinquish all jurisdiction over Rio Grande water upon delivery to Elephant Butte Reservoir" (New Mexico Exception No. 1); (2) the Master's conclusion that the Compact "overrides" the requirement that federal reclamation projects must comply with state law under Section 8 of the Reclamation Act, ch. 1093, 32 Stat. 390 (New Mexico Exception No. 2); (3) the Master's conclusion that the doctrine of equitable apportionment "supersedes" New Mexico's sovereignty over Rio Grande water within its borders (New Mexico Exception No. 3); and (4) the Master's "determination of historical facts obtained independently * * * without affording the parties an opportunity to review, verify, object to, or present countervailing evidence" (New Mexico Exception No. 4). N.M. Exceptions 2.

Colorado takes two exceptions to the Master's Report. Colorado contends that the Court should permit the United States to proceed only on a theory that New Mexico's actions threaten an international treaty that requires the United States to provide Mexico with

60,000 acre-feet of water per year from storage in Elephant Butte Reservoir (Colorado Exception No. 1). Colo. Exceptions Br. 2-3; see Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953. Colorado also takes exception to the Master's independent research into historical documents and requests that the Court "affirmatively abstain from adopting the Report's extraneous findings and conclusions as the law of the case" (Colorado Exception No. 2). Colo. Exceptions Br. 3.

For the reasons set forth below, the exceptions filed by New Mexico and Colorado should be overruled.

ARGUMENT

I. THE SPECIAL MASTER'S REASONING WOULD NOT DEPRIVE NEW MEXICO OF SOVEREIGNTY OR JURISDICTION OVER WATER WITHIN ITS BORDERS BEYOND WHAT NEW MEXICO AGREED TO IN THE COMPACT

New Mexico accepts the Master's recommendation that its motion to dismiss the complaints filed by Texas and the United States should be denied. N.M. Exceptions 1; N.M. Exceptions Br. 56-57 & n.15. New Mexico contends, however, that the Master's reasoning is flawed in some respects. N.M. Exceptions Br. 16-48. The Master's basic conclusions are that New Mexico may not allow diversions of water downstream of Elephant Butte Reservoir in New Mexico in a way that interferes with Texas's equitable apportionment of Rio Grande water, and that disagreements about the characteristics and scope of Texas's equitable apportionment must be resolved by the Court in this original action. Rep. 195-203, 216. Those conclusions are correct.

New Mexico's first three exceptions are based on a considerable overreading of isolated statements in the Master's Report. Those exceptions should be overruled.

A. The Special Master Did Not Conclude That New Mexico Totally Surrendered Its Authority Over Water Delivered To The Rio Grande Project

New Mexico contends (Exceptions Br. 16-30) that the Court should "reject the [Master's] finding that the Compact impaired New Mexico's sovereign administrative control over waters within its borders." *Id.* at 16-17. According to New Mexico, the Master incorrectly concluded that the Compact, by requiring New Mexico to "deliver" water into Elephant Butte Reservoir, Art. IV, 53 Stat. 788, requires "total surrender of New Mexico's sovereign authority to adjudicate and administer water rights" within the State. N.M. Exceptions Br. 19. In support of that exception, New Mexico focuses (*id.* at 18-19, 25) on statements in the Master's Report that New Mexico must "relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." Rep. 197 (interpreting New Mexico's obligation to "deliver" water to the Rio Grande Project (Project) under Article IV of the Compact). New Mexico is wrong to equate such statements to a finding that New Mexico "relinquish[ed] all jurisdiction" (N.M. Exceptions Br. 13) or "total[ly] surrender[ed] [its] sovereign authority" (*id.* at 19) over water delivered to the Project.

In its motion to dismiss, New Mexico took the position that it had no obligation to limit diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir. N.M. Mot. to Dismiss 40-45. The United States pointed out that New Mexico's posi-

tion was inconsistent with the requirement under Article IV of the Compact that New Mexico "deliver[]" a specific quantity of water to Elephant Butte Reservoir, 53 Stat. 788—a term that is generally understood to mean "the giving or yielding possession or control of something to another." U.S. Br. in Opp. to N.M. Mot. to Dismiss 38 (quoting *Black's Law Dictionary* 494 (9th ed. 2009)). The United States argued that when New Mexico "delivers" water to the Project, "it relinquishes control of the water to the Project," which then releases the water in accordance with irrigation demands. *Ibid.* (citing Compact Art. I(*l*), 53 Stat. 786). The Master was persuaded by that argument. Rep. 195-198.

New Mexico criticizes (Exceptions Br. 19-22) the Master's reliance on dictionary definitions of "deliver" to conclude that Article IV of the Compact "requires New Mexico to relinquish control and dominion over the water it deposits" in the reservoir. Rep. 197; see Rep. 195-198. New Mexico contends (Exceptions Br. 20-25) that applying those definitions is problematic because, under the doctrine of prior appropriation, water rights are usufructuary rights and New Mexico therefore cannot cede "ownership" of water within its borders. That observation misses the point.

The Master did not conclude that New Mexico literally cedes ownership of Rio Grande water in New Mexico to the United States (or anyone else) when it delivers water to the Project. Indeed, the Master recognized that the United States did not receive an apportionment of water under the Compact, that it obtained water rights for the Project pursuant to New Mexico law, and that it acts as "the storer and the carrier" of water for individual landowners. Rep. 230 (quoting *Nebraska* v.

Wyoming, 325 U.S. 589, 615 (1945)). The Master acknowledged in his Report that "the Project water leaving Elephant Butte [Reservoir] belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906." Rep. 212-213.

Neither the Compact nor the Master's interpretation of it "require[s]," as New Mexico puts it, "abrogation of New Mexico's sovereign authority" over water that flows from Elephant Butte Reservoir to the New Mexico-Texas state line. N.M. Exceptions Br. 25. The Compact does, however, impose limitations on the ways in which New Mexico may exercise its authority over that water. New Mexico contends that it is the owner of the water within its borders and "has the right to prescribe how [that water] may be used." *Id.* at 24 (quoting *Erickson* v. *McLean*, 308 P.2d 983, 987 (N.M. 1957)). But New Mexico agreed to limitations on the exercise of its sovereignty when it ratified the Compact in 1939. See 1939 N.M. Laws 59.

By compact, New Mexico agreed that it would deliver water to the Project at Elephant Butte Reservoir, Compact Art. IV, 53 Stat. 788, at which point it becomes "[u]sable [w]ater" that must be available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico, Compact Art. I(*l*), 53 Stat. 786. New Mexico cannot administer water rights in the area of New Mexico below Elephant Butte Reservoir in a way that interferes with the Project's ability to make deliveries to satisfy those demands. As the Master explained, Texas therefore seeks "an order compelling New Mexico 'to deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act' and enjoining New Mexico from interfering with or usurping the United

States' authority to operate the Rio Grande Project." Rep. 188 (quoting Tex. Compl. pp. 15-16). The United States similarly seeks an order requiring New Mexico to administer state law in accordance with the Compact, as it has agreed to do. U.S. Compl. p. 5. No party seeks a limitation of state sovereignty to any extent beyond what New Mexico agreed to in the Compact.

B. The Special Master's Reasoning Is Not Inconsistent With Section 8 Of The Reclamation Act Or The McCarran Amendment

New Mexico further contends (Exceptions Br. 30-42) that the Master erred in concluding that New Mexico state law "does not govern the distribution of the water apportioned by the Compact." Rep. 216. New Mexico contends that the Master's conclusion is inconsistent with Section 8 of the Reclamation Act, 32 Stat. 390, which requires federal reclamation projects to comply with state water laws concerning irrigation that do not conflict with specific congressional directives, and the McCarran Amendment (Department of Justice Appropriations Act, 1953), 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights in comprehensive general stream adjudications. This exception by New Mexico is likewise based on statements from the Master's Report that, in context, are not objectionable.

1. New Mexico focuses (Exceptions Br. 30-31, 36, 38) on statements in the Report that water delivered to the Project "is not subject to appropriation or distribution under New Mexico state law," Rep. 211, and that "New Mexico state law does not govern the distribution of the water apportioned by the Compact," Rep. 216. New Mexico contends (Exceptions Br. 31-36) that those

statements conflict with Section 8 of the Reclamation Act, which provides in pertinent part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

43 U.S.C. 383.

Although that provision required the United States to obtain water rights for the Project pursuant to New Mexico state law and subjects the Project to state water administration, this Court has held that Section 8 of the Reclamation Act does not override other specific directives of Congress. See, *e.g.*, *California* v. *United States*, 438 U.S. 645, 668 n.21, 670-679 (1978). The Compact, which was approved by Congress, 53 Stat. 785, is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2125 (2013); *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And in any event, the New Mexico legislature enacted the Compact into law, see N.M. Stat. Ann. § 72-15-23 (LexisNexis 2016), and the Compact therefore limits New Mexico water users from interfering with Project deliveries to New Mexico and Texas to meet irrigation demands as a matter of state law as well.

A state may adjust the rights of its citizens by entering into an interstate compact with the consent of Congress. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). An interstate

compact "operat[es] with the same effect as a treaty between sovereign powers," with "each [State] acting as a quasi-sovereign and representative of the interests and rights of her people." *Id.* at 107 (quoting *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838) and *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932)). An apportionment of water in an interstate compact is thus "binding upon the citizens of each State and all water claimants." *Id.* at 106. By entering into the Compact, New Mexico assumed an obligation to exercise its sovereignty over the water released by the Project in a manner that ensured that water delivered to the Project would be "[u]sable [w]ater" available for release by Reclamation for specific purposes under the Project. Compact Art. I(*l*), 53 Stat. 786.

New Mexico expresses concern (Exceptions Br. 36) that the Master "appears to view the Project as independent of state jurisdiction." But when read in context, statements in the Report that water delivered to the Project "is not subject to appropriation or distribution under New Mexico state law," Rep. 211, or is "not govern[ed]" by state law, Rep. 216, should be read as references to the full reach of state law as it would apply in the absence of modification by the Compact. The Master referred to "state law," on the one hand, and "the Compact," on the other, to distinguish between New Mexico's general law of prior appropriation and the specific requirements of the Compact. State law, including the Compact, requires New Mexico to protect Project water deliveries (including to Texas and Mexico) from interference or impairment.

2. New Mexico further contends (Exceptions Br. 36-40) that deference to state water law and administration

for the Project is bolstered by the McCarran Amendment, 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights in comprehensive adjudicatory proceedings. New Mexico contends (Exceptions Br. 37) that the McCarran Amendment "reinforces the conclusion that adjudication of the Project water right must occur in the pending state water adjudication." See N.M. Pecan Growers Amicus Br. 16-24; N.M. State Univ. Amicus Br. 15-24. Although the Project's state-law water right is being adjudicated in a state court proceeding, that does not eliminate the need for this Court's resolution of this dispute over the characteristics of Texas's equitable apportionment and New Mexico's obligations under the Compact not to allow interference with the Project's delivery of water in both States and to Mexico. The State's adjudication of water rights in New Mexico must respect Texas's apportionment and the protection of the Project under the Compact.

a. As described in the United States' brief in support of its exception (at 17-20), a New Mexico state court is currently determining the rights to the waters of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line, including the United States' water rights for the Project. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 (N.M. 3d Jud. Dist. filed Sept. 24, 1996) (*Lower Rio Grande Adjudication*).[1] The United States initially resisted

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[1] Docket entries for the state water adjudication are available at https://lrgadjudication.nmcourts.gov. For documents related to the adjudication of the United States' water right, see Lower Rio Grande Adjudication, *SS-97-104; US Interest (Reverse Chronological Order)*, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-

that adjudication—and instead filed a quiet-title action in federal court—on the ground that the Project has interstate and international obligations to deliver water. See U.S. Exception Br. 17 n.8. That view was initially shared by the New Mexico State Engineer, who moved to dismiss the state water adjudication on the ground that the state court did not have jurisdiction over Project water users in Texas, who, he argued, were indispensable parties. See *United States* v. *City of Las Cruces*, 289 F.3d 1170, 1178 (10th Cir. 2002) (discussing motion to dismiss state-court proceedings). The State Engineer later realigned as a plaintiff and commenced the current general stream adjudication only after the state court denied that motion. *Ibid.*

In quantifying the Project's water right in the state-court proceeding, the United States requested that the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre-feet per year, as recognized by a Texas water-rights decree. U.S. Mem. in Supp. of Mot. for Summ. J. 2, 28, *Lower Rio Grande Adjudication*, *supra* (filed Apr. 24, 2013). The New Mexico court concluded, however, that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside the scope of the elements that can properly be determined in this proceeding," and it did not mention the Project's need to deliver water to Mexico. Order 4, *Lower Rio Grande Adjudication*, *supra* (filed Feb. 17, 2014). Those rulings in the state water adjudication highlight the need for this Court to define Texas's equitable apportionment under the Compact and the protection under the Compact for the United

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reverse-chronological-order.aspx (last visited July 28, 2017) (online docket).

States' treaty obligation to deliver water to Mexico. Once the characteristics of Texas's equitable apportionment and protection for the treaty obligation are determined in these proceedings, the New Mexico state court must respect those rulings as it adjudicates water rights in the New Mexico portion of the Rio Grande Basin. This original action will thus inform the state water adjudication, not usurp it.

Without this Court's protection of Texas's equitable apportionment, New Mexico would not be constrained by anything other than its own interpretation of state law and the Compact from allowing Texas's allocation of Project water from Elephant Butte Reservoir to be diminished based on asserted state-law rights of New Mexico water users to take surface water or pump hydrologically connected groundwater outside the framework of the Project. The Master correctly recognized that definitive resolution of questions about the respective rights (and protection of the rights) of signatory States to water apportioned by the Compact, including rights to the water that is mandated by compact to be delivered by the Project, "must be decided pursuant to the original and exclusive jurisdiction of th[is Court]" in a case in which all the affected States are parties—not by a New Mexico state court. Rep. 216.

b. As described in the United States' brief in support of its exception (at 18-19), the state water-adjudication court has concluded that the United States' water right for the Project is a surface right only, and that the Project is not entitled to "groundwater." See Order Granting the State's Mot. to Dismiss the U.S. Claims to Groundwater and Denying the U.S. Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Aug. 16, 2012) (8/16/12 Order). The court acknowledged that

there is "an interactive relationship between groundwater and surface water" in the Rio Grande downstream of Elephant Butte Reservoir, but the court stated that New Mexico law "nevertheless recognizes surface water and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court further concluded that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." 8/16/12 Order 7 (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). Thus, under the court's ruling, the protection of Project seepage and return flow in the ground from appropriation can only be had upon an administrative determination by the State Engineer that the water has not "lo[st] its identity as [Project] surface water." *Ibid.* (citation omitted).

New Mexico and its amici contend that this Court should "preclude the United States from attempting to use this forum to relitigate settled issues regarding the nature and scope of its Project right." N.M. Exceptions Br. 56; see City of Las Cruces Amicus Br. 29-37; N.M. State Univ. Amicus Br. 31-37.[2] But this Court is not be-

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[2] The issues in the state water adjudication are not in any event "settled," N.M. Exceptions Br. 56, because no final judgment has been entered in the New Mexico state water adjudication. Once a final judgment has been entered, the United States will have the right to appeal. See Order Granting Mot. to Temporarily Suspend Proceedings for Sixty Days, *Lower Rio Grande Adjudication*, *supra* (filed July 7, 2017).

ing asked to determine or redetermine the Project's water right under New Mexico state law without regard to the Compact, nor did the Master conclude that New Mexico is without authority to conduct its state water adjudication. The Court is being asked, however, to define Texas's equitable apportionment of Rio Grande water under the Compact and the United States' ability under the Compact to satisfy its obligations to Project users, including deliveries to Mexico. Absent the Compact, New Mexico state law—to the extent not inconsistent with other federal law applicable to the Project—might permit New Mexico water users to pump groundwater in the area below Elephant Butte Reservoir that is hydrologically connected to the Rio Grande, and several of New Mexico's amici pump groundwater in that area. See, *e.g.*, N.M. State Univ. Amicus Br. 6-14, 24-30. In its complaint in intervention, however, the United States alleged that such groundwater pumping downstream from Elephant Butte Reservoir has intercepted or interfered with groundwater hydrologically connected to the Rio Grande, including Project seepage and return flows, to the detriment of Project deliveries. See U.S. Compl. ¶¶ 11, 13-15. The Compact necessarily limits the extraction of hydrologically connected groundwater to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands. See Art. I(k) and (*l*), 53 Stat. 786.

The merits of the complaints are not yet before the Court, nor has there been any factual development of the claims brought by Texas and the United States. The Court need not, as New Mexico requests (Exceptions Br. 56-57), impose vague limitations on the United States' role in this case that would preclude it from litigating issues related to the Project's water right. It is

appropriate for this Court to define Texas's equitable apportionment under the Compact and the United States' rights under the Compact to satisfy the requirement of the Project, and those rulings must be respected in the New Mexico water adjudication.

C. The Special Master Did Not Conclude That The Doctrine Of Equitable Apportionment Eliminates New Mexico's Authority To Administer Water Rights Below Elephant Butte Reservoir

New Mexico contends (Exceptions Br. 42-48) that the Master erred in concluding that an equitable apportionment of the Rio Grande "supersedes New Mexico's sovereignty over" Rio Grande water below Elephant Butte Reservoir. *Id.* at 2. New Mexico explains that under *Hinderlider* and *Alamosa-La Jara Water Users Protection Ass'n* v. *Gould*, 674 P.2d 914 (Colo. 1983) (en banc) (*Alamosa-La Jara*), the Rio Grande remains subject to New Mexico's authority to administer water rights within its borders, "both to ensure compliance with the [Compact's equitable] apportionment and to enforce state law and state appropriations where this does not directly conflict with the terms of the apportionment." N.M. Exceptions Br. 47.

The Master's decision should not be read to be inconsistent with *Hinderlider*, which the Master cites (along with *Alamosa-La Jara*) in the portion of his Report discussing equitable apportionment. See Rep. 211-213, 216. Nor should it be read to mean that New Mexico has no authority to administer water rights within New Mexico below Elephant Butte Reservoir. The Master's discussion of the effect of the equitable apportionment (Rep. 210-217) is best understood as requiring New Mexico to respect the Compact in its administration of

state law. Indeed, the Master noted that the New Mexico State Engineer has promulgated rules to ensure compliance with the Compact, and the Report explains that New Mexico, "like the Colorado State Engineer in [*Alamosa-La Jara*], is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir" that is incorporated into the Compact. Rep. 217.

In the context of the entire Report, the Master's statement that "state law applies only to the water which has not been committed to other states by the equitable apportionment" should be read to mean that New Mexico cannot administer water rights in a way that conflicts with the Compact's equitable apportionment. Rep. 216 (citations omitted). New Mexico is situated no differently from its upstream neighbor Colorado, which also has to act beyond the ordinary priority framework under state law to meet its obligations under the Compact. See *Hinderlider*, 304 U.S. at 106-107; *Alamosa-La Jara*, 674 P.2d at 921, 923. Although New Mexico, by entering into the Compact, has agreed to certain limits on how it may exercise its authority over water within the State, neither the Compact nor the Report deprive New Mexico of jurisdiction over Rio Grande water in New Mexico. The extent of the limitations imposed by the Compact will be determined in this proceeding.

II. THE UNITED STATES IS NOT LIMITED TO SEEKING RELIEF BASED ON THE PROTECTION OF ITS TREATY OBLIGATIONS

A. Colorado contends (Exceptions Br. 5-9) that the United States should be allowed to proceed as a plaintiff only to protect its interest in complying with the 1906 Treaty with Mexico. See *id.* at 5 ("[C]onsideration of

the United States' claims based on the 1906 [Treaty] is necessary."). Colorado takes exception to the Master's Report "to the extent it recommends allowing the United States to bring other claims that are not based on the 1906 [Treaty]." *Ibid.* The United States opposes that exception.

Colorado contends (Exceptions Br. 5) that the United States' non-treaty claims are "based on contracts" between the Bureau of Reclamation and water districts in New Mexico and Texas for delivery of Project water. Characterizing the United States' allegations concerning New Mexico's interference with Project deliveries as "contract claims," Colorado asserts (*id.* at 8) that the Court may need to join the water districts as parties to resolve claims based on those contracts. The United States, however, is not seeking to enforce or interpret its contracts with the water districts through this litigation.

The United States described its contracts with the water districts in its complaint in intervention in order to explain the unique federal interest that is impaired by New Mexico's violation of the Compact and the nature of the problem being created for the Project, which is incorporated into the Compact, by the diversion of surface water and pumping of hydrologically connected groundwater downstream of Elephant Butte Reservoir. See U.S. Compl. ¶¶ 8, 12-15. New Mexico's Compact violations interfere with Project operations by which the United States makes deliveries pursuant to contract. But it is the Compact, not the contracts, that defines the state obligations at issue here. Thus, the Master correctly observed that "the contracts between the state water improvement districts and the United States for the management of the Project are not at issue here."

Rep. 272. "Rather," the Master explained, "this case centers squarely on the * * * rights and duties of the sovereign signatory States under the Compact." *Ibid.* The United States asserts that the actions of water users in New Mexico interfere with Project deliveries that are protected by the Compact. U.S. Compl. ¶¶ 13-15. The United States is entitled to present that issue and to seek appropriate relief to protect its sovereign interests in the Project's operation. See U.S. Exception Br. 39-40.

B. Colorado further contends (Exceptions Br. 8) that allowing the United States to proceed on claims that New Mexico's actions harm the Project "may risk allowing the United States to take a position contradictory to the signatory States regarding Rio Grande Compact obligations," which Colorado states would "undermin[e] the positions of the actual parties." The possibility of such a difference in legal positions is not a valid reason to limit the United States' role as a party-plaintiff in this original action.

To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing federal reclamation project "as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204. The United States agreed to that arrangement through congressional approval of the Compact. 53 Stat. 785. The United States' ability to protect the integrity of Project operations that are incorporated into the Compact's equitable apportionment framework is a distinctive federal interest that warranted the United States' intervention in this case. See *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981).

Indeed, the Project's central role in effectuating the Compact's apportionment framework renders the United States' participation and willingness to be bound by any order in this case essential to the Court's ability to resolve the dispute among the compacting parties. In its brief opposing Texas's motion for leave to file a complaint, New Mexico explained that "[t]he United States is ultimately responsible for release and delivery of Project water * * * in both New Mexico and Texas," and that "[a]ny decree entered in the absence of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir." N.M. Br. in Opp. 33-34; see U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 5-6 (explaining that the Court's interpretation of the Compact in this case would affect the assumptions underlying Reclamation's calculation of diversion allocations between the water districts served by the Project). The United States has intervened and subjected itself to this Court's jurisdiction to permit a full resolution of the dispute among all parties over the interpretation of the Compact. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 10. It is not required to stand on the sidelines while the States decide how the Project should operate.

C. Colorado further contends (Exceptions Br. 5-8) that the United States' intervention in this case beyond seeking protection of its obligations under the 1906 Treaty is unwarranted because its claims otherwise overlap with those of Texas and thus can be resolved among the States. That argument should be rejected.

Nothing in this Court's cases provides that the United States is prohibited from protecting distinct federal interests that are at stake in an original action to

the extent its claims overlap with those of a State. And in any event, it remains to be seen whether the interests of Texas and the United States are completely aligned. Texas seeks relief related to Project water deliveries to Texas, but the Project is an interstate operation that delivers water to irrigation districts in both Texas and New Mexico, and the federal interest therefore extends to protection of Project deliveries in both States. Furthermore, Texas contends that New Mexico's water use below Elephant Butte Reservoir cannot alter "the conditions that existed in 1938 when the Compact was executed," Tex. Compl. ¶ 18, while Reclamation currently calculates Project releases pursuant to a settlement agreement with the water districts using a regression analysis that shows how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. See U.S. Exception Br. 11-12 (citing Bureau of Reclamation, U.S. Dep't of the Interior, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* 6-8 (Sept. 30, 2016)).[3] The United States, as a party-plaintiff in this case, is not required to rely on Texas to enforce the Compact's protection of the Project.

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[3] Available at https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf.

III. THE PLEADINGS ARE SUFFICIENT TO SUPPORT THE DENIAL OF NEW MEXICO'S MOTION TO DISMISS WITHOUT RELIANCE ON CONTEXTUAL DISCUSSION IN THE REPORT

New Mexico and Colorado, joined by amici, raise concerns that the Master conducted an independent investigation into the history of the Compact and made findings and conclusions based on documents that he located on his own, which the parties did not have an opportunity to analyze. See Colo. Exceptions Br. 9-12; N.M. Exceptions Br. 49-55; Albuquerque Bernalillo Cnty. Water Util. Auth. Amicus Br. 16-23; City of Las Cruces Amicus Br. 15-20; N.M. Pecan Growers Amicus Br. 8-16. As New Mexico and Colorado recognize (Colo. Exceptions Br. 3; N.M. Exceptions 1), the Master's recommendations may be adopted without reliance upon those materials.

In original actions, the Federal Rules of Civil Procedure "may be taken as guides." Sup. Ct. R. 17.2. This Court has stated that a court deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), should consider the complaint, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Federal Rule of Civil Procedure Rule 12(d) provides that if, on a motion to dismiss under Rule 12(b)(6), matters outside the pleadings "are presented to and not excluded by the court," the motion must be treated as one for summary judgment and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

In the Report, the Master provided quite a substantial historical account of the events preceding the adoption of the Compact by the States and its approval by Congress. Rep. 31-187. The Master explained that he "recount[ed] the relevant legislative and negotiating history in order to give the Compact context." Rep. 193. He specifically stated, moreover, that "nothing detailed [in the Report] should be construed as fact finding violative of Fed. R. Civ. P. 12," because "nothing in the historical record was dispositive regarding the ultimate recommendations of the [R]eport." Rep. 193. The Master's reasoning supports that statement.

In the Report, the Master analyzed the text and structure of the Compact and concluded that Texas had stated a claim upon which relief can be granted based on those considerations alone. Rep. 194-203. The Master explained that "[b]ecause the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the stream, no need exists to rely upon the history of the 1938 Compact to interpret that language." Rep. 203. The historical materials were therefore not necessary to the Master's recommendation; they merely "confirm[ed] the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209.

Of course, it is not unusual for a court to recite the historical context for a dispute, including by reference to applicable statutes and treaties, relevant legislative history, and official government reports or other materials of which a court may take judicial notice. There is

no reason why such materials may not be considered here. But in any event, to resolve the motions to dismiss that are currently pending before this Court, the Court must determine whether the pleadings of Texas and the United States state a claim upon which relief can be granted. The Court need not rely on the full range of historical materials cited by the Master in his Report to decide that question. The documents cited by the Master can be analyzed and supplemented by the parties during further briefing or discovery as the case proceeds, which all parties agree that it should. By the same reasoning, the Court need not address the additional factual allegations and materials set forth in amicus briefs in support of New Mexico's exceptions. See City of Las Cruces Amicus Br. 21-29; N.M. Pecan Growers Amicus Br. 8-16. The parties will have an opportunity to present and analyze all of the relevant documents and other materials as the case proceeds.

CONCLUSION

The exceptions of New Mexico and Colorado to the Special Master's First Interim Report should be overruled.

Respectfully submitted.

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO AND STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

BRIEF OF THE STATE OF KANSAS AS *AMICUS CURIAE* IN SUPPORT OF TEXAS

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QUESTION PRESENTED

The Rio Grande Compact equitably apportions the waters of the Rio Grande Basin. The Compact provides for Texas's fair share of the waters by requiring New Mexico to deliver a specified amount of water to the Elephant Butte Reservoir, a federal reclamation project located in New Mexico approximately 105 miles north of the Texas state line. The water is then distributed based on contracts with irrigation districts in New Mexico and Texas. Texas alleges that New Mexico has violated the Compact through excessive groundwater pumping and other diversions in New Mexico below the Elephant Butte Reservoir (and above the New Mexico-Texas border) that have depleted the stream flow in the basin, thereby intercepting water allocated to Texas.

The important question the State of Kansas will address is whether the Rio Grande Compact, or any interstate water compact, allows an upstream State to unilaterally reduce a downstream State's apportioned share of water through groundwater pumping or any other diversion that depletes stream flow.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The State of Kansas is all too familiar with the upstream-State tactics New Mexico is using to deprive Texas of the water it is entitled to receive under the Rio Grande Compact. First, agree to an interstate compact that equitably apportions a shared scarce water resource, here the waters of the Rio Grande Basin. Next, use groundwater pumping and other diversions to avoid the compact's restrictions on water usage, leaving the downstream State with less than its allocated share of water. Finally, when challenged, put the downstream State to great expense and potentially years of delay by litigating in defense of the upstream State's unlawful actions.

Nebraska followed this strategy against Kansas in recent years, exceeding its allocation under the Republican River Compact by 70,869 acre-feet in just two years. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 (2015). When Kansas called it to task starting in the early 1990s, Nebraska (like New Mexico here) claimed the Compact did not cover groundwater pumping, even if it reduced Republican River stream flow and in turn reduced the amount of water available to Kansas. This Court rejected Nebraska's attempt to supplement its compact allocations at Kansas's expense, *see id.* at 1050 (citing *Kansas v. Nebraska*, 530 U.S. 1272 (2000)), and ordered Nebraska to disgorge a portion of its ill-gotten gains, *id.* at 1057, in addition to the compensatory damages Nebraska ultimately agreed to pay Kansas, *id.* at 1053.

Kansas is a predominantly downstream State with little leverage over upstream States other than the costly and time-consuming remedy of original action litigation in this Court; the same remedy Texas was forced to resort to in this case. Given its geographic predicament, Kansas has a substantial interest in ensuring that upstream States are not allowed to circumvent interstate water compacts through excessive groundwater pumping (or other water diversions) that deprives downstream States like Texas and Kansas of the water they have been allocated under such compacts.

SUMMARY OF THE ARGUMENT

Kansas offers three points in support of Texas and the Special Master's conclusion that the Rio Grande Compact precludes New Mexico from intercepting water allocated for Texas under the compact by extracting it through groundwater pumping or other diversions before the water reaches Texas.

I. The Court has repeatedly recognized the well-established hydrological fact that there is a negative connection between groundwater pumping and stream flow, and has already concluded that several interstate water compacts take groundwater into account. *See, e.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1050 (2015); *Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Texas v. New Mexico*, 446 U.S. 540 (1980). Excessive groundwater pumping leads to reduced stream flow, which in turn reduces the amount of water a downstream State receives under a compact. New Mexico's bold claim that it can satisfy its Rio Grande Compact obligations by delivering water to the Elephant Butte Reservoir, and subsequently

intercepting and diverting the water allocated to Texas before the water reaches Texas, indisputably deprives Texas of the water it bargained for. Such upstream State tactics require a forceful response from this Court.

In *Kansas v. Nebraska*, 135 S. Ct. at 1057, this Court recognized that downstream States' geographic predicament creates a structural imbalance in interstate compacts that tempts upstream States to take more than their fair share of water at the expense of downstream States. The Court also recognized that one of its roles is to help stabilize interstate water compacts by reducing the allure of that temptation. *Id.* The Court could use this case to do just that—provide further structural balance and stability for downstream States by adopting a presumption that interstate water compacts that equitably apportion shared waters cover any extraction of groundwater or other diversion that reduces the apportioned stream's surface flow.

II. Kansas's history with interstate water disputes, dating back to 1902, highlights the damage upstream States can cause when they refuse to curb excessive groundwater usage or otherwise divert surface water. For example, Nebraska refused for years to bring its groundwater pumping in the Republican River Basin under control. In 2005 and 2006 alone, Nebraska exceeded its compact allocation by nearly 71,000 acre-feet, which is enough to sustain a city of one million people for a year, and enough to seriously injure farmers who rely on Republican River water for irrigation. Only after 15 years of litigation, including proceedings in this Court, did Kansas recover a total of $5.5 million ($3.7 million for Kansas's loss and

$1.8 million in disgorgement). But Kansas and its farmers forever lost the water they were entitled to receive during the water-short years of 2005 and 2006. *Kansas v. Nebraska*, 135 S. Ct. at 1056, 1059.

III. New Mexico claims that the Special Master's interpretation of the Rio Grande Compact violates its sovereignty by precluding New Mexico from intercepting water allocated to Texas under the Compact. But an interstate compact that Congress approves is a federal law that preempts conflicting state law. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013). And the preemptive effect of interstate compacts raises no federalism concerns because the States must negotiate a compact before Congress can approve it and make it federal law. Congress does not write the compacts; the States themselves do. New Mexico's state sovereignty argument is nothing more than an attempt to undermine the very compact that New Mexico itself negotiated with Texas.

ARGUMENT

The Rio Grande Compact equitably apportions the waters of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. The Compact requires New Mexico to deliver a specified amount of water to Elephant Butte Reservoir, a federal Bureau of Reclamation project located roughly 105 miles from the New Mexico-Texas border. Rep. 160-61 & n.43.[1] The federal Bureau of Reclamation then distributes the

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[1] This brief cites the First Interim Report of the Special Master as "Rep."

water downstream based on contracts with irrigation districts in southern New Mexico and western Texas that preexisted the Rio Grande Compact. On this much, it appears New Mexico and Texas agree. *See* Rep. 210-11.

But a dispute arose when New Mexico began allowing surface water diversions and groundwater pumping in areas of southern New Mexico between the Elephant Butte Reservoir and the New Mexico-Texas border. Texas alleges that in 2011, New Mexico allowed tens of thousands of acre-feet of water to be diverted or pumped. And, Texas claims, because the surface and ground water in the Rio Grande Basin are hydrologically connected to the Rio Grande below the Elephant Butte Reservoir, New Mexico's unlawful diversions and pumping reduced the amount of water that reaches Texas. In ruling on New Mexico's motion to dismiss, the Court must accept these factual allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

New Mexico moved to dismiss Texas's complaint, claiming that it can satisfy its obligations under the Rio Grande Compact by delivering to Elephant Butte the amount of water the Compact requires, much of which is allocated for use in Texas, then diverting and pumping a substantial amount of the water intended for Texas before it reaches the state line.

The Special Master rightly concluded that New Mexico's position is absurd based on the text, structure, and purpose of the Compact. Rep. 194-210. As he said, "it is unfathomable to accept that Texas 'would trade away its right to the Court's equitable apportionment,' had it contemplated then that New Mexico would be

able to disown its obligations under the 1938 Compact and simply recapture water it delivered to [Elephant Butte], destined for Texas, upon its immediate release from the Reservoir." Rep. 209 (citation omitted) (quoting *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015)).

New Mexico now "accedes" to the Special Master's recommendation to deny its motion to dismiss, but apparently only as a strategy for leaving open the possibility of relitigating whether it can satisfy its Compact obligations by giving water with one hand, getting credit for it under the Compact, then taking it away with the other. *See* New Mexico Exceptions Br. 1, 13, 27-28 & n.8. New Mexico claims it has never argued that "it may simply deliver water to Elephant Butte and then recapture that water for use in New Mexico with no regard for Texas' Compact rights." *Id.* at 24. Yet that is exactly what it argued in its motion to dismiss—that no "term of the Compact imposes a duty on New Mexico . . . to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir." New Mexico Motion to Dismiss 28.

New Mexico doubles down on this argument in its exceptions brief, repeatedly claiming to have a sovereign right to use the waters within its borders as it sees fit, bound only by New Mexico law. *See, e.g.*, New Mexico Exceptions Br. 16 & n.7 ("New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and state law."), 31 (the Reclamation Act defers to state law).

It should come as no surprise that Kansas, a predominantly downstream State, is troubled by upstream States' claims that they are accountable only to themselves to regulate their water usage—even in the face of a binding interstate compact approved by Congress. New Mexico, as some of Kansas's upstream neighbors have done in the past, ignores the alleged connection between its groundwater pumping and the stream flow the Rio Grande Compact has equitably apportioned. Experience has demonstrated, and this Court has ruled, that downstream States like Texas and Kansas are short-changed by upstream States' diversions of water—including ground water pumping—that reduce stream flow. Such actions violate many, if not all, interstate compacts, and if left unchecked will undermine the legal protection that compacts are supposed to provide downstream States.

I. Interstate Water Compacts Should Presumptively Cover Groundwater Pumping that Affects Agreed-Upon Equitable Apportionment.

The "hydraulic connection between stream flow and groundwater is a well established scientific fact." First Report of the Special Master at 2-3 n.3, *Kansas v. Nebraska*, No. 126, Orig. (Jan. 28, 2000), *available at* https://www.supremecourt.gov/SpecMastRpt/Orig126_012800.pdf ("McKusick Rep."). "[S]treams gain water from inflow of ground water through the streambed, they lose water to ground water by outflow through the streambed, or they do both, gaining in some reaches and losing in other reaches." Thomas C. Winter, et al., *Ground Water and Surface Water: A Single Resource: U.S. Geological Survey Circular 1139*

9 (1998), *available at* https://pubs.usgs.gov/circ/1998/1139/report.pdf. "[G]roundwater pumping intervenes . . . in the hydrological cycle, intercepting water that would otherwise flow to the stream." Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 U. Kan. L. Rev. 1263, 1297-98 (2014). And the "over-pumping of groundwater produces depletions" in stream flow that can be permanent if left unchecked. *Id.*

Though New Mexico seems to ignore this fact, this Court has not. For example, in *Kansas v. Nebraska*, 530 U.S. 1272 (2000), this Court "summarily agreed" with the special master's recommendation that groundwater pumping should be counted against Nebraska's annual allotment of water in the amount that the pumping depleted stream flow in the Republican River Basin. *Kansas v. Nebraska*, 135 S. Ct. at 1050. The Court rejected Nebraska's argument, which New Mexico has reprised here, that groundwater pumping was outside the scope of the Republican River Compact, even if it diminished stream flow. *Id.*

But the Court's reiteration in *Kansas v. Nebraska* of the connection between groundwater and surface water is nothing new and should not have caught any upstream State by surprise. Even in water-rights disputes that *predate* the 1938 Rio Grande Compact, this Court acknowledged this fundamental hydrological principle.

In 1907, this Court decided *Kansas v. Colorado*, 206 U.S. 46, an original action in which Kansas complained that Colorado irrigators were depleting the Arkansas river upstream and depriving Kansas of water it was entitled to receive. The Court observed that "[i]f the bed

of a stream is not solid rock, but earth, through which water will percolate, . . . undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface." 206 U.S. at 114.

In 1923, the Court decided *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, involving "conflicting claims to underground waters collected and brought to the surface by a mining tunnel" along a tributary of the Provo River in Utah. *Id.* at 597. The Court described the waters the tunnel intercepted and collected as "percolating waters, which before [the tunnel] was driven found their way naturally, but not in a defined channel, through the rocks, gravel, and soil of the mountain into open springs near the stream, and thence by surface channels into the stream." *Id.* at 598.

The mining company that built the tunnel claimed it was entitled to the groundwater the tunnel collected and brought to the surface. An irrigation company downstream of the tunnel claimed it was entitled to the water because long before the tunnel existed the irrigation company appropriated all the waters of the stream for irrigation and other beneficial uses. *Id.* at 597-98.

The Court agreed with the irrigation company that "waters percolating underground" within public lands were "open to appropriation for irrigation or other beneficial uses" and that "*appropriation of the natural flow of a surface stream . . . reach[es] and include[es] its underground sources of supply within the public lands.*" *Id.* at 599 (emphasis added); *see also, e.g.*, Samuel C.

Weil, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1929) ("[C]onnection between surface streams and groundwater is usual, and in fact invariable.").

Again in 1976, the Court recognized that "(g)roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert v. United States*, 426 U.S. 128, 142 (internal quotation marks omitted); *see also Texas v. New Mexico*, 462 U.S. 554, 557 (1983) ("If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years.").

Consistent with the Court's repeated acknowledgment of the fundamental hydrological connection between groundwater and surface water, the Court has held that a compact does not need to apportion groundwater directly, or even make specific reference to groundwater consumption, in order to create enforceable restrictions on groundwater consumption. For example, in *Texas v. New Mexico*, 446 U.S. 540 (1980), the methodology the Court approved for determining compact violations took into account groundwater use. McKusick Rep. 35-36. In *Kansas v. Colorado*, 514 U.S. 673 (1995), the Court held that a provision in the Arkansas River Compact prohibiting "material depletions in usable river flows" covered "improved and increased pumping by existing wells." *Id.* at 690 (internal quotation marks and alterations in original omitted). And in *Kansas v. Nebraska*, 135 S. Ct. at 1050, the Court summarily approved the special master's recommendation that the Republican River Compact, which equitably apportioned "virgin

water supply" within the Republican River Basin, included "the entire natural stream flow of the Basin, which includes all groundwater that would be part of the stream flow in the Basin" if it were not intercepted by "the activities of man such as pumping." McKusick Rep. 28; *see also Kansas v. Nebraska*, 530 U.S. 1272.[2]

New Mexico, like Nebraska before it, asks this Court to ignore the scientifically established effect its groundwater consumption has on water intended for Texas under the Rio Grande Compact. Adopting New Mexico's approach would not only deny the hydrological fact that groundwater and surface water are related, it would undermine the purpose of interstate water compacts to avoid interstate conflict and promote the equitable apportionment of interstate streams, which deliver "a necessity of life" to downstream States. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

More than a century of interstate water disputes demonstrates that some upstream States will press their geographic advantage in violation of a compact, unless and until this Court specifically orders them to stop. Downstream States like Texas and Kansas have little leverage, and no immediate remedy, for even the most egregious compact violations. Recognizing downstream States' "vulnerable" position, and the Court's role of "guarding against upstream States'

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[2] See also Burke W. Griggs, *The Political Cultures of Irrigation and the Proxy Battles of Interstate Water Litigation*, 57 Nat. Resources J. 1, 4-5, 38 (2017), in which Professor Griggs describes the "interstate 'water wars,'" litigated under this Court's original jurisdiction, where the Court held on several occasions that interstate water compacts cover groundwater.

inequitable takings of water," this Court in *Kansas v. Nebraska*, 135 S. Ct. at 1057, ordered Nebraska to disgorge a portion of its profits from repeated compact violations due to its failure to control groundwater pumping. The Court intended that remedy to stabilize the compact by deterring future violations and promoting the compact's successful administration. *Id.*

New Mexico's abuse of its upstream position to intercept water intended for Texas under the Rio Grande Compact warrants a similarly strong response from this Court. Given upstream States' repeated failure to respect this Court's admonishment not to cheat on compact obligations through excessive groundwater pumping, this Court should use this case to expressly adopt a presumption that interstate compacts that equitably apportion shared waters necessarily cover any extraction of groundwater or other diversion that reduces the apportioned stream flow.

Such a presumption would not be novel. For example, the Colorado Supreme Court long ago adopted a similar presumption that places the burden of proof on one asserting that groundwater is not "tributary" to "the stream in the watershed of which it lies." *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951); *accord Kobobel v. State Dep't of Nat. Res.*, 249 P.3d 1127, 1136-37 (Colo. 2011).

Like the disgorgement award in *Kansas v. Nebraska*, a presumption tailored to the interstate compact context would stabilize compacts by reminding upstream States of their legal obligations, deter future violations by putting upstream States on notice that groundwater pumping that reduces a downstream

State's share of water presumptively violates an interstate water compact, and promote successful administration of compacts by improving the structural balance between upstream and downstream States.

Absent a more aggressive approach to upstream compact violators, downstream States like Texas and Kansas will be relegated to enforcing their compact rights through the costly and lengthy process of original action litigation in this Court. The prospect of an award of money damages, and possibly some disgorgement, years after compact violations is a poor substitute for the timely receipt of water to which downstream States are entitled.

II. Kansas's Experience Shows the Significant Detrimental Effects of Upstream States' Circumvention of Compact Promises through Excessive Groundwater Pumping.

Kansas has suffered a long and unfortunate history of upstream States taking advantage of their upstream positions to trample Kansas's water rights. *See, e.g.*, *Kansas v. Colorado*, 206 U.S. at 99, 117; *Kansas v. Colorado*, 185 U.S. 125, 145-46 (1902). Even after securing interstate compacts equitably apportioning the waters of interstate rivers shared with neighboring upstream States, Kansas repeatedly has had to resort to litigation in this Court to enforce its compact rights due to the upstream States' overuse of groundwater. *See, e.g.*, *Kansas v. Nebraska*, 135 S. Ct. at 1049-50; *Kansas v. Colorado*, 514 U.S. at 690.

Nebraska was the most recent culprit. And perhaps because Nebraska's approach—to violate the compact now and pay pennies on the dollar a decade

later—worked so well, New Mexico is running a very similar play at Texas's expense.

Shortly after Congress approved the Rio Grande Compact in 1939, it approved the Republican River Compact in 1943. Under the Republican River Compact, Kansas, Nebraska, and Colorado agreed to equitably apportion the Republican River's "virgin water supply," defined as Republican Basin water that is "undepleted by the activities of man" for the States' "beneficial consumptive use" of such water. *Kansas v. Nebraska*, 135 S. Ct. at 1049.

Between 1960 and 1990, the groundwater-irrigated acreage in Nebraska's part of the Basin expanded from about 175,000 acres to nearly a million acres. Naturally, the increase in groundwater pumping started reducing the Republican River's flow, and in turn reducing the water Kansas was receiving under the Compact. In the 1980s, Kansas complained to the Republican River Compact Administration that Nebraska was violating the Compact. But Nebraska ignored Kansas's complaints, claiming that the Compact did not cover groundwater pumping.

From 1995 to 1997, the States attempted to mediate the dispute, to no avail. In 1998, Kansas initiated an original action in this Court against Nebraska and Colorado to enforce its rights under the Republican River Compact. Nebraska filed a motion to dismiss, arguing (much as New Mexico does here) that the Compact did not cover groundwater pumping—even if the pumping diminished the Republican River's stream flow and the amount of water Kansas could receive under the Compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1050. The special master recommended denying

Nebraska's motion to dismiss, concluding that Nebraska's groundwater pumping counted against Nebraska's annual allotment of water to the extent it depleted Republican River stream flow in the basin. This Court summarily agreed. *Id.*; *Kansas v. Nebraska*, 530 U.S. 1272.

And this was just the beginning of the saga. After much negotiation, Kansas, Nebraska, and Colorado agreed on accounting procedures to govern how groundwater usage would be incorporated into determining water allocations under the Compact. *Kansas v. Nebraska*, 135 S. Ct. at 1050. Yet Nebraska immediately exceeded its allocation under the new accounting procedures.

Nebraska's repeated and egregious overuse of water due to excessive groundwater pumping is detailed in a 2013 special master report. *See* Report of the Special Master, *Kansas v. Nebraska*, No. 126, Orig. (Nov. 15, 2013), *available at* https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/Orig126_report_special_master.authcheckdam.pdf ("Kayatta Rep."). It shows that between 2003 and 2006, Nebraska exceeded its compact allocation by 132,929 acre-feet. *In 2005 and 2006 alone, Nebraska overused by nearly 71,000 acre-feet—enough water to sustain a city of one million people for a year.*

Nebraska's compact violations had a tremendous negative economic impact on Kansas farmers who rely on Republican River water for irrigation. In 2005 and 2006, the on-farm impact of Nebraska's overuse was more than $1 million *each year*. *See* Kayatta Rep. 171. Add in all the secondary effects of this loss and the total comes to nearly $2 million per year. *Id.*

The effects of upstream overuse are substantial, widespread, and difficult to calculate precisely. And this does not include the cost to a State like Kansas of engaging in more than a decade of litigation to bring Nebraska into compliance with its compact obligations. Nor does it account for the fact that the performance Kansas bargained for in the Republican River Compact, like Texas in the Rio Grande Compact, was *water*—water the State cannot replace and will never receive.

III. New Mexico's Interpretation of the Rio Grande Compact, Not Texas's and the Special Master's, Disrespects State Sovereignty.

There can be no doubt that Kansas is a staunch defender of States' rights, including States' sovereign prerogative to regulate the natural resources within their borders. *See, e.g.*, Brief of the States of Kansas, Indiana, Missouri, and 19 Other States as *Amici Curiae* in Support of Petitioners, *Am. Farm Bureau Fed'n v. U.S. Envt'l Protection Agency*, No. 15-599 (S. Ct. Dec. 9, 2015) (arguing that the Environmental Protection Agency's interpretation of its authority under the Clean Water Act to set "the total maximum daily load" for certain bodies of water encroaches on States' traditional authority to regulate land use within their borders), *cert. denied*, 136 S. Ct. 1246 (Feb. 29, 2016). Regulating the lands and waters within a State's borders is a "quintessential state and local power" that is not easily overridden. *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality).

But New Mexico's claim—that its state water law supersedes an interstate water compact negotiated and signed by the affected States and enacted by Congress as federal law—is absurd. There is nothing novel or offensive to States' sovereignty about recognizing that *an interstate compact* can limit a compacting State's groundwater usage.

To begin with, this is not the first time an upstream State has made such an argument. In 1938—the year that Texas, New Mexico, and Colorado agreed to the Rio Grande Compact—the Court observed:

> The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in litigation concerning other interstate streams, but has been consistently denied by this Court. The rule of equitable apportionment was settled by *State of Kansas v. Colorado*, 206 U.S. 46, 97 [(1907)].

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938); *see also, e.g.*, *New Jersey v. New York*, 283 U.S. at 342, 343 (interstate streams "offer[] a necessity of life that must be rationed among those who have power over it"; while "New York has the physical power to cut off all the water within its jurisdiction . . . clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated").

Moreover, when States negotiate and enter compacts they voluntarily agree to give up some of the authority they might otherwise have over the water

within their borders. Once the States agree to terms, Congress must approve the compact before it can take effect. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, ..."). Congress approved the Rio Grande Compact in the Act of May 31, 1939, 53 Stat. 785. But it is the States themselves who negotiate the terms and provisions.

Once given, "congressional consent transforms an interstate compact . . . into a law of the United States." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The Supremacy Clause, Art. VI, cl. 2, then ensures that a congressionally approved compact, as a federal law, preempts any state law that conflicts with the compact. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013).[3]

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[3] New Mexico heavily relies on *Tarrant Regional Water District* to support its breathtaking claim that the Rio Grande Compact places no limit on New Mexico's sovereign authority to intercept water intended for Texas before it hits the Texas border. But as Texas has amply explained, *Tarrant Regional Water District* has no bearing on this case because Texas does not seek to appropriate water in New Mexico or enter that State and export water. Tex. Reply Br. 30. To be clear, Kansas does not contend that the Rio Grande Compact, or any other compact, should be construed as granting to the downstream State an enforceable groundwater right in the upstream State. Rather, Kansas argues, consistent with this Court's cases, that interstate water compacts restrict upstream States' authority to allow groundwater pumping or other diversions to the extent they diminish water supply that a compact has apportioned.

That the States necessarily must agree to the terms of a compact before Congress consents, is the same reason why the presumption against preemption does not apply to compact interpretation:

> [T]he presumption against pre-emption is rooted in respect for the States as independent sovereigns in our federal system and assume[s] that Congress does not cavalierly pre-empt state laws. When the States themselves have drafted and agreed to the terms of a compact, and Congress' role is limited to approving that compact, there is no reason to invoke the presumption.

Tarrant Reg'l Water Dist., 133 S. Ct. at 2132 n.10 (internal citation and quotation marks omitted).[4]

Instead, it is New Mexico's interpretation of the Rio Grande Compact that presents a serious threat to State sovereignty. In the Rio Grande Compact, co-equal sovereign States agreed to equitably apportion the waters of the Rio Grande Basin. Rather than respect Texas's right to the water it bargained to receive, New Mexico authorized groundwater pumping that intercepts the water intended for Texas before it

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[4] Where an interstate water compact is not involved, States retain their traditional "plenary control" over waters within their borders. *See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *see also, e.g.*, Petition for a Writ of Certiorari, *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, No. 17-40, 4, 35-36 (S. Ct. July 5, 2017), *petition pending*; Petition for Writ of Certiorari, *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, No. 17-42, 16-17 & n.3 (S. Ct. July 3, 2017), *petition pending*.

reaches the state line. Such a flagrant violation of Texas's sovereign interest highlights the need for swift adjudication of downstream States' compact rights and strict enforcement in the event of a violation.

CONCLUSION

The State of Kansas respectfully requests that the Court reject New Mexico's attempt to undermine the Rio Grande Compact by delivering water to Elephant Butte one day, then intercepting it the next before the water reaches its intended destination in Texas. To prevent such duplicitous behavior, Kansas urges the Court to adopt a presumption that similar interstate water compacts cover groundwater pumping and other diversions that reduce apportioned stream flow. Such a presumption would provide more structural balance between upstream and downstream States under existing compacts, and deter upstream States from using tactics like New Mexico's to circumvent their compact obligations.

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RECORD AND BRIEFS

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim
Report of the Special Master

TEXAS'S SUR-REPLY

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TEXAS'S SUR-REPLY

The State of Texas took no exception to the Special Master's First Interim Report (First Report). Texas supports both the Special Master's recommendation and his supporting analysis, and urges the Court to deny New Mexico's Motion to Dismiss.

The reply briefs of some Parties and *amici curiae*, however, attempt to trivialize this interstate compact litigation as one that is focused upon Reclamation law and all of its requirements and limitations. In so doing, they re-characterize the Texas Complaint and the nature of this interstate compact litigation. This case is about the 1938 Rio Grande Compact (1938 Compact or Compact). Any formulation of the issues raised in the Texas Complaint, the New Mexico Motion to Dismiss, or the discussion of the First Report that puts the Rio Grande Project (Project) before or separate from the 1938 Compact distracts from the litigation of Texas's Compact injury.

There is a relationship between the 1938 Compact and the Project. The Special Master properly addressed and accurately characterized that relationship in the First Report. The Special Master concluded that: the 1938 Compact integrates the Project "wholly and completely," First Report at 198; the signatory States intended to use the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's apportionment, First Report at 204;

and the water delivered by New Mexico *into* Elephant Butte Reservoir "has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico . . . ," First Report at 213. "Therefore, the Project water *leaving* Elephant Butte belongs to either New Mexico or Texas *by compact*, or to Mexico by the Convention of 1906." First Report at 212-13 (emphasis added); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-08 (1938) (describing the effect of an equitable apportionment achieved by compact).

In short, the 1938 Compact uses the Project to deliver Compact water. Because the Compact uses the Project, the operation of the Project and the use of water in New Mexico necessarily implicates the amount of Compact water delivered to Texas. The unauthorized depletion of Project return flows and seepage in New Mexico necessarily diminishes the amount of Compact water delivered to Texas. This is the injury Texas alleges in its Complaint. *See* Tex. Compl. ¶¶ 18-19, 21. The Compact's use of the Project to make deliveries of water apportioned by Compact, however, does not render the case brought by Texas any less of a compact case.

In each reply brief filed by the Parties to the case and the *amicus curiae*, much is said of:

- the water rights for the Project held by the United States, *see* New Mexico's Reply to Exceptions of United States and Colorado (N.M. Reply) at 34-45; Br. of *Amicus Curiae*

El Paso County Water Improvement Dist. No. 1 In Supp. of Texas's Reply to Exceptions Regarding the First Report and In Supp. of Certain Exceptions of United States (EPCWID Reply) at 21-26; Elephant Butte Irrigation Dist.'s *Amicus Curiae* Br. In Supp. of Texas (EBID Reply) at 21-23;

- the state laws that apply to the Project, *see* N.M. Reply at 34 n.9, 38-39; EBID Reply at 14-18;

- and the ways in which irrigation districts with contracts for Project water have conceded to operating the Project, without regard to the States' apportionment under the Compact, Reply Br. for the United States at 20; EPCWID Reply at 28-32; EBID Reply at 4-5, 9-10.

These issues and arguments are not directly relevant to Texas's Compact claims. Texas's Compact litigation is not about the 2008 Operating Agreement, the reclamation contracts executed by the irrigation districts, the State water right adjudications, or the Project's water right. These matters have the potential of detracting from the fundamental issue raised by Texas in its Complaint: that New Mexico has violated the Compact. Texas asks this Court to first determine what the Compact requires of New Mexico—not what the Project, Reclamation law, or

state water law requires.[1] Tex. Compl., Prayer for Relief ¶¶ 1-2.

On this point, the Special Master correctly determined that as a matter of interstate compact, enacted into law by three States and the United States Congress,

> New Mexico, through its agents or subdivisions, may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation . . . That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico.

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[1] These issues may be relevant to the claims brought by the United States, and may be introduced into this litigation depending on the Court's ruling on the Special Master's recommendation on New Mexico's motion to dismiss the United States' Complaint. *See* Tex.'s Reply to Exceptions to First Interim Report of Special Master at 40-41.

First Report at 213. For the reasons explained in Texas's Reply to Exceptions to the First Report, the Special Master's Compact interpretation is sound, and the Court should adopt in full the Special Master's conclusions on New Mexico's obligations under the Compact.

The administration of the Lower Rio Grande has been disputed for decades, as evidenced by the multiple lawsuits brought by water users in each state and the intrastate adjudications conducted in both Texas and New Mexico. The specific relief Texas seeks from this Court is a determination of rights and duties under the Compact. *See* Tex. Compl., Prayer for Relief ¶¶ 1-2. The administration and operation of the Project and the consequences of bringing New Mexico into compliance with its Compact obligations for New Mexico water users need not be decided now on the Motion to Dismiss. Assuming the Court accepts the Special Master's recommendation to do so, the Special Master may address these contentions as the case moves forward and as appropriate, consistent with the direction issued by the Court.

The State of Texas respectfully requests that this Court accept the Special Master's recommendation and analysis and deny New Mexico's Motion to Dismiss.

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RECORD AND BRIEFS

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INTRODUCTION

All of the Parties filed reply briefs, addressing some aspect of the exceptions by Colorado, New Mexico, and the United States to the First Interim Report of the Special Master ("Report"). In addition, the City of El Paso, El Paso County Water Improvement District No. 1 ("El Paso District"), Elephant Butte Irrigation District ("Elephant Butte District"), and the State of Kansas filed briefs as amici curiae.

In this sur-reply brief, the State of Colorado disputes the following arguments that appear in the reply and amici briefs:

(1) That the Court should adopt the presumptions and historical context in the Report as factual findings and legal conclusions. (Texas Reply pp. 11-21, City of El Paso Brief pp. 6-7, Elephant Butte District Brief pp. 24-30, El Paso District Brief p. 12.);

(2) That a State cannot administer water to meet its Compact obligations. (El Paso District Brief pp. 15-17, Elephant Butte District Brief pp. 17-21.);

(3) That the United States asserts a claim under the Compact. (Texas Reply pp. 39-40, United States Reply pp. 16-20, El Paso District Brief pp. 15-17.); and

(4) That the Court should adopt a presumption that all interstate water compacts regulate ground water. (Kansas Brief pp. 7-13.)

By responding only to the four issues stated above, Colorado does not imply agreement with other arguments raised in the briefs.

SUMMARY OF ARGUMENT

First, the Report is limited in scope and the Court should not adopt its numerous presumptions and historical context as factual findings and legal conclusions. Although it includes descriptions of Río Grande Compact history and Río Grande Project operations, the Report limits its ultimate recommendations to: (a) denying the motion to dismiss Texas' Complaint; (b) dismissing the United States' claims that asserted rights under the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. § 37-66-101 ("Compact"); (c) extending the Court's non-exclusive jurisdiction to hear the United States' non-Compact claims; and (d) denying motions to intervene filed by the El Paso District and Elephant Butte District. Consistent with Fed. R. Civ. P. 12, in deciding these motions, the Report assumes the allegations in the Complaints are true. The recommendations do not rely upon the Report's additional discussions of material beyond the four corners of the Compact. It is inappropriate for the Parties to misuse this contextual material to advance arguments beyond the Report's ultimate recommendations on the pending motions. The Court should, therefore, affirm the limited scope of the Report and confirm that

the Report does not make findings and conclusions beyond the ultimate recommendations on dismissal and intervention.

Second, the Court should reject the argument that a State cannot administer water to meet its Compact obligations. The Report did not reach the merits of the case, but presumed the allegations in the Complaints were true in considering whether to dismiss the claims. It did not determine how the States might administer water consistent with the terms of the Compact. Therefore, the Report did not recommend eliminating State roles in administering water subject to Compact apportionment.

Third, the Court should uphold the recommendation to dismiss the United States' claims made under the Compact. The United States bases its injury on delivery obligations from the Río Grande Project, not on the Compact itself.

Fourth, the Court should deny the request to adopt a presumption that all interstate water compacts regulate ground water. Such a presumption is contrary to the law on compact interpretation.

ARGUMENT

I. This Court should affirmatively limit the scope of the Report and confirm that the Report does not make findings and conclusions beyond the ultimate recommendations on dismissal and intervention.

The Court should limit the scope of the Report to the recommendations for deciding the pending motions. Contrary to some of the assertions in the briefs, the Report's determinations focused solely on whether to dismiss the Complaints of Texas and the United States, and whether to allow intervention by the El Paso District and Elephant Butte District. In setting forth its recommendations, the Report explained that it presumed the allegations in the Complaints were true pursuant to Fed. R. Civ. P. 12.

> I am required to assume as true, under Rule 12(b)(6), Texas' factual allegation that New Mexico, through its officers, agents, and political subdivisions, is diverting or intercepting water that belongs to Texas after Reclamation releases it from Elephant Butte Reservoir to irrigate lands of the Rio Grande Project.

Report p. 201; *see also* Report p. 191. The Report also expressly confirmed that the additional recitation of contextual materials was not dispositive of the final recommendations. Report pp. 193, 203. Thus the Report simply assumed New Mexico is allowing diversions of water released from the Río Grande Project, and released Project water belongs to Texas, without

further evaluation. Although the Report's recommendations are narrow, some Parties and amici, as described below, have tried to expand its reach to include conclusions on the merits of several issues that were not yet before the Special Master and are not now before the Court. The Court should reject those attempts and affirmatively limit the scope of the Report to its ultimate recommendations on the pending motions and nothing more.

Some briefs misinterpret the Report as equating Project operations with Compact obligations. For example, many of the briefs emphasize the need for the Project to be able to make contract deliveries. Texas Reply pp. 12, 19, 24, 30, 31, 33, 40; United States Reply p. 8; Elephant Butte District Brief pp. 4, 8; El Paso District Brief pp. 2, 6, 9, 12, 16-18, 28, 29. However, this litigation is about the Compact, not the Project. Report p. 272. Discussing the Project, Texas and the El Paso District mention that the Project relies on return flows of water in its calculation of deliveries to El Paso District. Texas Reply p. 26; El Paso District Brief p. 29. Return flows require an initial use upstream, with residual, unconsumed water flowing downstream for subsequent delivery. Understanding the limits of water available for use within New Mexico downstream from Elephant Butte Reservoir and what exact administrative measures are needed for Compact compliance in New Mexico will require evaluation of apportionment made by the Compact. Indeed, the question presented by Texas' Complaint is not whether Project water deliveries are accomplished as contemplated,

but whether New Mexico is interfering with the Compact's apportionment among the States. Therefore, arguments about Project operations presume as fact what actually requires further development in this Compact litigation.

For purposes of the motions considered, the Report presumes that the Project releases a certain volume of water that comprises Texas' Compact allocation, and that New Mexico is taking it. Report p. 201. Upon examination of the Compact language, it is evident that the presumptions used to resolve the motions are not fully informed by the four corners of the Compact. The Compact contains tables of stream flow relationships that set downstream delivery obligations based on upstream inflow measurements, subject to the remaining provisions of the Compact. Compact, Arts. III and IV. These describe Colorado's delivery obligations at the Colorado-New Mexico state line measured at or near Lobatos and New Mexico's at San Marcial, now measured at Elephant Butte Reservoir. However, there is no corresponding table for deliveries of Project water. Therefore, the Compact itself does not contain any express division of Project water deliveries between lower New Mexico and Texas. Further, while the Compact requires measurement gages at the inflow and outflow points for scheduled deliveries of Colorado in Article III and New Mexico in Article IV, it prescribes no gages to measure the delivery of Project water to lands in New Mexico and Texas after it is released from Project storage. Compact, Art. II. Therefore, the Report presumed that the Compact intended a specific volume

of Project water to make up Texas' Compact allocation. Report p. 200. However, it never identifies what volume that may be or how the Compact measures that allocation. Of course, the Report did not need to when deciding the motions for dismissal or intervention.

Overall, "[t]he merits of the complaints are not yet before the Court. . . ." United States Reply p. 14. The Parties may establish that the presumptions are correct in further proceedings, but cannot rely upon them as the law of the case at this stage of the litigation. The Report acknowledges that the express terms of the Compact are the best indication of the intent of the States. Report p. 193. Yet, the Compact lacks express terms for many of the presumptions that the Report uses. Findings and conclusions not based on the language in the Compact require resort to outside materials and are beyond the scope of the ultimate recommendations of the Report.

II. The Report does not conclude that Compact apportionment divests a State of its water administration authority.

The Court should reject the argument that a State lacks authority to administer water to meet Compact obligations. *See* El Paso District Brief pp. 15-17, Elephant Butte District Brief pp. 17-21. Compact apportionment and State administration of water are not mutually exclusive. Rather, a State's administration cannot be contrary to specific Compact obligations. "The Master's discussion of the effect of the equitable

apportionment (Rep. 210-217) is best understood as requiring New Mexico to respect the Compact in its administration of state law." United States Reply p. 15-16. Although the United States argued New Mexico has to deliver water at Elephant Butte Reservoir, it does not argue that such delivery divests New Mexico of jurisdiction over water within its borders. Rather, it intended only that New Mexico has committed to operate consistent with the requirements of the Compact with regard to water it has delivered. The Report should be understood accordingly.

III. The United States does not bring Compact claims because its allegations of injury are based on the Project, not the Compact.

The Court should reject the argument that the United States asserts a claim under the Compact. *See* Texas Reply pp. 39-40, United States Reply pp. 16-20, El Paso District Brief pp. 15-17. The United States' interests are based in the Project. Report p. 219; United States Reply p. 17. It asserts no rights under the Compact itself. That point is proven by the United States' claims of injury – none relate to any right under the Compact. Its alleged claims of injury relate to its obligations to deliver water from the Project. United States Complaint p. 4. Further, to the extent the Project is a vehicle for delivering Compact water, the Compact interests are represented by the States among whom the water is apportioned.

The United States' assertion that it may not be entirely aligned with the Compact interests of Texas does not rebut the Report's recommendation to dismiss its Compact claims. The Project delivers water to irrigation districts in two States: New Mexico and Texas. Both States are Parties to this litigation. Together, Texas and New Mexico will adequately represent their respective Compact interests.

A theory of agency does not support providing the United States a right of action under the Compact. *See* Texas Reply p. 40. Even if the United States were an agent to deliver Compact apportionments to the States, alleged Compact injuries are to the States, not to the United States. Report p. 231 (stating the Compact makes no apportionment of water to the United States). Furthermore, the United States lacks standing to sue as an agent for the States. "The general rule for both contract and tort suits is that an agent has no standing to sue, in his own name, a third party who has allegedly perpetrated some actionable wrong against the principal." *Moorer v. Hartz Feed Co.*, 120 F. Supp. 2d 1283, 1289 (M.D. Ala. 2000) (citing Restatement (Second) Agency § 374(2)). In the context of a Compact action, the injury is to compacting States. Report pp. 220, 229-230. The United States cannot bring a claim as an agent for the injury suffered by the principal.

IV. The Court should reject the request to adopt a legal presumption that ground water is regulated by all interstate water compacts.

Each interstate water compact is a unique reflection of the water resource and agreement of the compacting States apportioning it. The Court reviews a compact under principles of contract law. *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013). When reviewing a complaint brought under a compact, the Court does not add new terms to the compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). The Court has also recognized States only give up their sovereign interests to natural resources through explicit statements. *Tarrant Regional Water Dist.*, 133 S. Ct. at 2132. Therefore, because each is unique, whether and how ground water is part of a compact depends upon the terms of the compact and the intent of the compacting States. It is improper to impose blanket presumptions, not otherwise supported by the intent of the compacting States, and contrary to the law regarding interpretation of compacts.

CONCLUSION

The Court should affirmatively limit the scope of the Report to its narrow recommendations on the pending motions. The Court should not adopt the Report's numerous presumptions and historical context as factual findings and legal conclusions. It should also

accept the Report's recommendation to dismiss the United States' Compact claims.

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RECORD AND BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

STATE OF NEW MEXICO'S SUR-REPLY TO THE REPLIES OF THE UNITED STATES, TEXAS, AND COLORADO

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INTRODUCTION

In this brief, the State of New Mexico responds to the Replies of the United States ("U.S. Reply"), the State of Texas ("Texas Reply"), and the State of Colorado ("Colorado Reply"). In addressing these filings only, New Mexico does not intend to imply agreement with arguments raised by *amici* El Paso County Water Improvement District No. 1 ("EPCWID"), Elephant Butte Irrigation District ("EBID"), the City of El Paso, or the State of Kansas.

The United States has moderated the position it took in its exceptions ("U.S. Br.") and now argues the Special Master's reasoning does not deprive New Mexico of sovereignty over water within its borders. U.S. Reply at 3-7. The United States contends the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact") imposes some limits on how New Mexico may exercise its authority over water within New Mexico south of Elephant Butte ("Lower Rio Grande"), while acknowledging the extent of these limitations has yet to be determined in these proceedings. *Id.* at 16. In response to Colorado, the United States asserts it is not limited to raising claims under the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention"), but may raise claims under reclamation law or the Compact itself. *Id.* at 16-20. Finally, the United States concedes there is

no reason for the Court to rely on the historical materials cited in the First Interim Report of the Special Master ("Report"). *Id.* at 23.

In contrast to the United States, Texas maintains the Report interpreted the Compact as depriving New Mexico of jurisdiction over water once it is delivered to Elephant Butte. Texas Reply at 6. Texas opposes New Mexico's exceptions ("N.M. Br.") challenging the Report's reasoning regarding New Mexico's sovereignty over water within the Lower Rio Grande, arguing this reasoning is necessary to support the Report's conclusions. *Id.* at 1. Texas argues New Mexico law and even federal reclamation law no longer apply to water delivered to Elephant Butte because the doctrine of equitable apportionment supersedes these authorities. *Id.* at 25, 28-29. Further, Texas supports the Special Master's historical discussion and citation to extrinsic materials, arguing the Master made no findings of fact. *Id.* at 36-37.

Responding to the United States' exceptions, Texas agrees with the United States that it should be allowed to raise Compact claims related to the Compact's equitable apportionment, but disputes the Special Master's recommendation that the United States should be allowed to raise claims under Reclamation law because, in Texas's view, "the doctrine of equitable apportionment, not Reclamation Law, governs the [Rio Grande] Project's delivery of apportioned water." *Id.* at 39-41. Finally, Texas urges the Court to reject the arguments raised by *amici* City of Las Cruces ("Las Cruces") and Albuquerque Bernalillo County Water Utility

Authority ("ABCWUA") as inconsistent with New Mexico's position. *Id.* at 41-44. It then argues the Court should deny the motions for leave to file of New Mexico State University ("NMSU") and the New Mexico Pecan Growers ("NMPG") because they duplicate New Mexico's arguments, and because Texas itself refused to consent to their motions. *Id.* at 45-48.

In its reply, Colorado addresses only the United States' exceptions, arguing the Compact grants the United States no right of action to protect water deliveries made pursuant to the 1906 Convention because the Compact's plain language expressly disavows any impact on the United States' international interests. Colo. Reply at 3. Colorado also asserts the Compact, as an agreement among the signatory States apportioning water among those States, creates no separately enforceable federal right of action. *Id.* at 6. Colorado argues the United States' participation in other original action water disputes confirms it has been allowed to participate to protect federal interests, like reclamation projects, treaty obligations, and the rights of Indian tribes, not to assert compact claims against a signatory State. *Id.* at 7-10. Finally, Colorado contends the United States is not a third-party beneficiary to the Compact, which directly benefits only the signatory States. *Id.* at 10-13.

SUMMARY OF ARGUMENT

All parties now agree with the Special Master's conclusion that the Compact incorporates the Rio Grande Project ("Project") to distribute the waters of the Rio Grande between Elephant Butte and Fort Quitman, Texas, although the manner of its incorporation is still in dispute. Beyond this, the Report's analysis has sparked confusion. For example, the United States now argues the Report does not interpret the Compact as a full revocation of New Mexico's sovereign jurisdiction over water within its own borders, but it argued in its exceptions that the Report concluded the Compact strips New Mexico of control and dominion over water delivered to Elephant Butte. Texas, by contrast, asserts the Report concluded the Compact's apportionment supersedes state law and reclamation law in the Lower Rio Grande. Colorado does not directly address New Mexico's sovereignty, but does argue the Compact contains no terms addressing Project operations. In spite of this confusion, the United States and New Mexico now generally agree that state law applies below Elephant Butte Dam, so long as it is not inconsistent with the Compact.

The parties also disagree regarding the proper treatment of the historical discussion in the Report, sometimes respecting the Master's disclaimer that the Report should not be construed as making findings of fact, but sometimes citing material from this discussion in support of their arguments. As evidenced by the confusion about the meaning and significance of the

Report, the Report's reasoning has created controversies unnecessary to decide the Motions to Dismiss and should not be adopted.

This confusion, and the potentially drastic consequences for New Mexico's sovereignty should the Report's reasoning be allowed to stand, demonstrates why the Court should disregard Texas's assertion that the Report should be adopted in full. The Court has declined to adopt the reasoning in special master reports in other cases, even when accepting those masters' recommendations. The Special Master's conclusion here that the Compact incorporates the Project as a means of distributing apportioned water to southern New Mexico and Texas supports the conclusion that Texas may bring a Compact claim alleging interference with the Project, rendering the other reasoning in the Report unnecessary and potentially prejudicial.

The Court also should not allow itself to be swayed by Texas's continued misrepresentation of New Mexico's arguments and position. New Mexico does not claim and has never argued that it has a right under the Compact, New Mexico law, or any other authority to deplete Texas's apportionment of water. Texas's repeated assertion that this is the case, whether intentional or not, interferes with the ability of the parties, the Special Master, and the Court to focus on the actual issues at hand.

Texas also fails to present any reason for the Court to conclude the Compact or the doctrine of equitable apportionment supersede all other sources of law in

the Lower Rio Grande. The cases Texas cites stand for the noncontroversial proposition that state law must respect the apportionment in a compact, not that a compact's apportionment completely supersedes all other sources of law governing the apportioned water, including reclamation law.

Nor does Texas offer a persuasive reason for the Court to disregard *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013) ("*Tarrant*"). *Tarrant*'s reasoning is not limited to the specific factual circumstances of that case but applies more broadly to any interpretation of an interstate compact. *Tarrant* is clearly relevant to the parties' disagreement over the legal implications of the term "deliver" in Article IV of the Compact.

Further, Texas's contradictory position that the arguments of *amici* Las Cruces and ABCWUA should be rejected as inconsistent with New Mexico's arguments while the motions for leave to file of *amici* NMSU and NMPG should be rejected because their arguments are too consistent with New Mexico's offers the Court no reason to disregard any of these *amici*'s briefs. Each of these *amici* provides important context on water and groundwater use in the Lower Rio Grande and the potential impacts of the Special Master's ruling on southern and central New Mexico.

Finally, New Mexico supports Colorado's Reply and agrees that the United States should not be allowed to raise claims based on the Compact. The Compact is meant to apportion the waters of the Rio

Grande among the signatory States, and the Compact's reliance on the Project as a means of distributing some of this water does not confer a Compact right of action on the United States to protect either Project operations or its treaty obligations. The United States may assert other causes of action to protect its interests in this area.

ARGUMENT

I. Response to the United States

A. The Parties' Differing Interpretations of the Report Demonstrate Why the Report's Reasoning Should Not Be Adopted.

The briefing on the Report has demonstrated that the parties do not agree on what the Report concludes. Although in its exceptions brief, the United States relied on those parts of the Report which undermine New Mexico's sovereignty, U.S. Br. at 23, 29, 34, 36-37, the United States in its Reply has modified this position. The United States' new position, more in keeping with federal law, argues the Report should not be interpreted to conclude New Mexico "literally cedes ownership of Rio Grande water in New Mexico to the United States (or anyone else) when it delivers water to the Project." U.S. Reply at 5. It urges that, "in the context of the entire Report," the Special Master's troubling statements about New Mexico's sovereignty should be interpreted to mean only that "New Mexico cannot administer water rights in a way that conflicts

with the Compact's equitable apportionment." *Id.* at 16. The United States insists New Mexico is merely "overreading . . . isolated statements in the Master's Report," and the Report does not have the sweeping implications New Mexico fears. *Id.* at 4.

If New Mexico is "overreading" the Report, then Texas does the same. Texas contends the Report concluded that, "once New Mexico has delivered that apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water." Texas Reply at 33. Elsewhere, Texas states the Report "correctly identifies the legal regime governing the delivery and distribution of Texas's Compact apportionment as the doctrine of equitable apportionment, not New Mexico state law." *Id.* at 25. Texas further argues New Mexico cannot "adjudicat[e] . . . rights to water that has already been equitably apportioned under the Rio Grande Compact." *Id.* at 32; *see also* EPCWID Reply at 3, 15.

The parties also disagree regarding the proper treatment of the historical discussion in the Report. They sometimes respect the Master's disclaimer that the Report should not be construed as making findings of fact, U.S. Reply at 22 (citing Report at 193), but sometimes cite material from this discussion in support of their arguments, U.S. Br. at 34 (citing Report at 120). Despite this, all parties save Texas now agree the Report's historical discussion is problematic and should be stricken, or do not oppose striking it. Colo. Br. at 9-13; N.M. Br. at 49-55; U.S. Reply at 23.

The parties' disagreement over the Report's meaning and implications demonstrates that the Report should be disavowed. If the Court simply denies New Mexico's Motion to Dismiss and remands the case to the Special Master without addressing the Report, the parties will continue to disagree over the Report's meaning. New Mexico and the United States will argue the Report should not be read expansively to deprive New Mexico of jurisdiction over water in the Lower Rio Grande, while Texas will insist this is now the law of the case. The Court should avoid this confusion by disavowing the Special Master's unnecessary reasoning regarding New Mexico's sovereignty when it denies the Motion to Dismiss Texas's Complaint.

Nor is there any reason for the Court to adopt the Report's reasoning in order for it to accept the Report's conclusions. *See* U.S. Reply at 23. It is not unusual for the Court to decline to adopt the reasoning in a special master's report while still accepting some or all of the master's conclusions.[1] *E.g.*, *South Carolina v. North*

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[1] Further, Texas suggests the Court should defer to the Report because the Court typically applies a "tacit presumption of correctness" to a special master's findings, Texas Reply at 9 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984)). In addition to addressing findings of fact, not conclusions of law, *Colorado v. New Mexico* provides that "the ultimate responsibility" for deciding a case remains with the Court. 467 U.S. at 317. "[T]he Master's reports and recommendations are advisory only. . . . The Court itself determines all critical motions and grants or denies the ultimate relief sought. . . ." Eugene Gressman et al., *Supreme Court Practice* § 10.12, 643 (9th ed. 2007). Texas presents no persuasive reason for the Court to defer to the Report's problematic reasoning here.

Carolina, 558 U.S. 256 (2010) (accepting the special master's recommendation, but rejecting the master's proposed standard and rationale). In this instance, where the Report's reasoning is so unclear and its potential ramifications so drastic, the Court should explicitly decline to adopt the Special Master's flawed reasoning while accepting the ultimate conclusion—denial of the Motion to Dismiss Texas's Complaint. Further proceedings in this case, including discovery, will give the Court the opportunity to address the remaining issues in this case based upon properly gathered evidence.

B. The United States and New Mexico Agree the Compact Does Not Deprive New Mexico of Jurisdiction over Water Below Elephant Butte.

In its Reply, the United States agrees with New Mexico that neither the Compact nor the doctrine of equitable apportionment require New Mexico to relinquish sovereignty over water in the Lower Rio Grande. U.S. Reply at 6, 15-16. The United States also recognizes that New Mexico law continues to apply to Project water deliveries. *Id.* at 9. In so recognizing, the United States finally admits, as New Mexico has argued since the inception of this case, that "[s]tate law . . . protect[s] Project water deliveries (including to Texas and Mexico) from interference or impairment." *Id.* The United States cautions that the Compact imposes "limits on how [New Mexico] may exercise its authority over water," *id.* at 16, a point New Mexico has

never contested. New Mexico agrees with the United States that "[t]he extent of the limitations imposed by the Compact" have yet to be determined in this proceeding. *Id.*

The United States further agrees with New Mexico that this Court is not being asked to "determine or redetermine the Project's water right," *id.* at 13-14, and that the Court's interpretation of the Compact will instead "inform the state water adjudication, not usurp it," *id.* at 12. New Mexico is encouraged to hear the United States confirm that it has no intention of seeking to relitigate the scope of the Project right before this Court.

II. Response to Texas

A. The Report of the Special Master Should Not Be Adopted in Full.

Texas urges the Court to adopt the Report "in full," arguing that the Special Master's reasoning is necessary to support his conclusions.[2] Texas Reply at 1. This is incorrect. The Special Master's conclusion that the Compact incorporates the Project provides a Compact cause of action to protect Texas's apportionment in the Lower Rio Grande, which is sufficient for Texas's Complaint to survive a motion to dismiss. In addition, the

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[2] It is not clear why Texas argues the Report should be adopted in full, as Texas disagrees with the Report's conclusion that the United States' Complaint in Intervention should be limited to claims arising under reclamation law and 28 U.S.C. § 1251(b)(2). Texas Reply at 39-41.

Court has no obligation to accept the Report's reasoning to accept its conclusions. *South Carolina v. North Carolina*, 558 U.S. at 265, 276. All parties except Texas agree the Report should not be adopted in full. The Court need not and should not accept the Report's reasoning here.

New Mexico's Motion to Dismiss was submitted in good faith, and was based on an interpretation of the Compact that has been advanced in prior lower court opinions. *See* N.M. Br. at 7 (citing *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) ("[T]he Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte between New Mexico and Texas.")). States involved in other compact disputes have similarly tested theories or interpretations of various compacts at the outset of litigation by means of motions to dismiss. *E.g.*, *Montana v. Wyoming*, 563 U.S. 368, 373 (2011).

New Mexico has accepted the Special Master's rejection of this theory and his conclusion that the Compact incorporates or relies on the Project as a means to distribute water apportioned to lower New Mexico and Texas. Accordingly, New Mexico elected not to take exception to the recommendation that its Motion to Dismiss Texas's Complaint be denied. While the Special Master should have ended his analysis with the conclusion regarding the Compact's incorporation of the Project, a point that definitively determined Texas had a Compact claim and could proceed, he went further,

making determinations that were incorrect and unnecessary for the reasons explained in New Mexico's exceptions. To avoid the confusion the Report has generated, and to prevent its sweeping and unnecessary conclusions from becoming the law of the case, the Court should disavow the Report's reasoning when denying New Mexico's Motion to Dismiss Texas's Complaint.

B. Texas Misstates New Mexico's Position.

Texas continues to misrepresent New Mexico's position before this Court. New Mexico has repeatedly disclaimed that it has a right arising under the Compact, New Mexico state law, or Reclamation law to deplete Project water allocated for delivery to Texas beneficiaries after its release from Elephant Butte. *See, e.g.*, N.M. Reply Br. on Mot. to Dismiss at 4; N.M. Br. at 24. Ignoring New Mexico's representations before the Special Master and to this Court, Texas argues New Mexico's "fundamental legal argument" is that New Mexico has a "Compact right to intercept, divert, and deplete water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line." Texas Reply at 5-6; *see also* Texas Reply at 22 ("New Mexico asserts that it may intercept and divert water leaving the Reservoir before it crosses the New Mexico-Texas state line because that water . . . is governed by New Mexico state water law." (internal quotation omitted)).

Texas's continued misrepresentation of New Mexico's position interferes with the ability of the Court, the Special Master, and the parties to address the actual legal issues presented by New Mexico's Motion to Dismiss, the Report, and the exceptions thereto. It is unclear whether Texas's mischaracterization of New Mexico's argument is intentional. Either way, New Mexico reiterates what has always been its position: acceptance of New Mexico's jurisdiction over water in the Lower Rio Grande does *not* allow New Mexico to unilaterally deplete Texas's apportionment. It *does* allow state law jurisdiction over water in accordance with Section 8 of the Reclamation Act and this Court's precedents. 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 678 (1978) (recognizing that the exercise of a State's jurisdiction must be consistent with congressional directives).

Texas also misrepresents New Mexico's position when it asserts that New Mexico argues Texas's "sole remedy for redress of its Compact complaints are [sic] with the New Mexico State Engineer or the New Mexico Adjudication Court." Texas Reply at 28. On the contrary, by taking no exception to the Special Master's recommendation to deny its motion to dismiss, New Mexico has conceded Texas may pursue its claims in this forum. New Mexico also concedes that the question of whether and to what extent Texas has been injured, as well as the appropriate remedies for any injury, will be litigated in this forum.

In short, the case is ready to take the next steps to address the central issues in this dispute, which include the effect of groundwater pumping in both Texas and New Mexico, and whether Project operations under the 2008 Operating Agreement interfere with the Compact's apportionment of water in southern New Mexico and Texas by causing the United States to overdeliver water to Texas to the detriment of New Mexico.

C. The Compact Is Not Inconsistent with State Water Administration in the Lower Rio Grande.

Texas claims New Mexico's arguments regarding Section 8, the McCarran Amendment, and state law are irrelevant because the Compact "takes precedence" over these authorities. Texas Reply at 28-29, 31; *see also id.* at 40-41 ("[T]he doctrine of equitable apportionment, not Reclamation Law, governs the Project's delivery of apportioned water."). Yet, the existence of the Compact does not mean state law and other federal authorities no longer apply in the Lower Rio Grande.

Texas's argument is predicated on its understanding that the Compact is inherently inconsistent with New Mexico's administration of water below Elephant Butte. But Texas offers no concrete examples of this inconsistency, and neither the United States nor New Mexico share that understanding. Rather, as discussed in New Mexico's exceptions, by incorporating the Project as the mechanism for distributing the apportionment of water to southern New Mexico and Texas, the

States envisioned administration of the Project within New Mexico consistent with the Compact.

Texas also cites no authority in support of its novel theory that the existence of a compact apportionment means the doctrine of equitable apportionment supersedes reclamation law and state law, and its view is contradicted by this Court's precedents. For example, *Nebraska v. Wyoming* held that the United States was bound by Section 8 and other provisions of the Reclamation Act in its operation of the North Platte Project, despite the apportionment the Court implemented in that case. *See* 325 U.S. 589, 611-16 (1945). Indeed, if the Court accepts Texas's view that only the doctrine of equitable apportionment applies to Reclamation projects distributing apportioned water, Texas Reply at 40-41, many federal reclamation projects in the West will no longer be bound by state law or reclamation law.

Texas also argues *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), prohibits application of state law to water that "has already been equitably apportioned under the Rio Grande Compact." Texas Reply at 32. As a basis for this claim, Texas asserts that "*Hinderlider* provides that 'state law applies only to the water which has not been committed to other states by equitable apportionment.'" *Id.* (incorrectly quoting *Hinderlider*, 304 U.S. at 106-08, whereas the quoted language does not appear in that case). Texas's characterization of *Hinderlider* is mistaken. *Hinderlider* does not hold that apportionment displaces state law, but provides merely that,

whether an apportionment among States is made by compact or by this Court's decree, it is "binding upon the citizens of each State." 304 U.S. at 106. As New Mexico explained in its exceptions, *Hinderlider* clearly recognizes that state law and administration is necessary to ensure an equitable apportionment is effectively implemented. N.M. Br. at 42-45.

The quotation Texas attributes to *Hinderlider* is in fact from the Colorado Supreme Court case *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 922 (Colo. 1983) ("*Alamosa-La Jara*"). Taken in context, it is clear the *Alamosa-La Jara* court did not intend this statement to deprive a State of jurisdiction to engage in administration consistent with a compact. The court in that case recognized the authority of the Colorado State Engineer to regulate the use of water in Colorado, even water committed to other states by equitable apportionment. *See id.* at 935-36 (affirming certain rules but remanding others to the state engineer for consideration of Colorado laws requiring maximum utilization of water).

D. *Tarrant* Controls Interpretation of the Term "Deliver."

As New Mexico discussed in its exceptions, this Court's opinion in *Tarrant*, 133 S. Ct. at 2132-33, counsels against a reading of the Compact that would deprive New Mexico of the ability to administer water rights and otherwise apply its laws governing water use within its borders south of Elephant Butte. N.M.

Br. at 25-30. In response, Texas argues that *Tarrant* is inapplicable here because it is factually distinguishable from the present situation. Texas Reply at 30. However, Texas presents no compelling reason for the Court to disregard *Tarrant* here.

Texas argues the Compact is not silent on uses of water below Elephant Butte because Article IV requires New Mexico to "deliver" water to Elephant Butte. *Id.* at 31. However, the term "deliver" does not expressly define or control uses of water in the Lower Rio Grande. While the parties agree the use of "deliver" in Article IV requires New Mexico to physically convey specified quantities of water to Elephant Butte, they disagree regarding the legal implications thereafter of the term "deliver." *Tarrant* is clearly relevant to the question of whether this term can be interpreted so broadly as to deprive New Mexico of any jurisdiction over this water, a position advocated by Texas and adopted by the Special Master. *Tarrant* does not forbid a State from divesting itself of jurisdiction via compact, but such a concession must be express. *See* 133 S. Ct. at 2133. The Compact contains no such express declarations.

E. The Court Should Consider the Arguments Raised in *Amicus* Briefs Filed in Support of New Mexico.

Texas asserts the arguments submitted by *amici* Las Cruces and ABCWUA should be rejected because they are inconsistent with New Mexico's arguments.

Texas Reply at 42-45. Texas then urges the Court to deny the motions for leave to file of NMSU and NMPG because their arguments are duplicative of New Mexico's arguments. *Id.* at 46-48. Texas misconceives the point of *amicus* briefs. The fact that some *amici*'s arguments may diverge from or supplement New Mexico's arguments, while still supporting New Mexico, illustrates that they have distinct interests that should be considered by the Court.

Texas also argues the Court should deny NMSU's and NMPG's motions for leave to file because of its decision to withhold consent, which was granted by all other parties. *Id.* While a motion for leave to participate as an *amicus curiae* may generally be disfavored when a party withholds consent, U.S. Sup. Ct. R. 37.2(b), the Court has suggested it applies a more relaxed standard to *amici* participation in original actions. *See South Carolina v. North Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in part and dissenting in part); *see also* Joseph D. Kearney and Thomas W. Merrill, "The Influence of *Amicus Curiae* Briefs on the Supreme Court," 148 U. Pa. L. Rev. 743, 762 (Jan. 2000) (noting that the Court's "current practice in argued cases is to grant nearly all motions for leave to file as *amicus curiae* when consent is denied by a party"). Texas provides no compelling reason for the Court to deny the participation of *amici* supporting New Mexico while allowing the participation of *amici* supporting Texas.

Moreover, denying NMPG leave to participate as an *amicus* would deprive southern New Mexico farmers of their voice by leaving EBID, an entity taking a position at odds with NMPG's interests, as the sole *amicus* purporting to represent farmers' interests.[3] The Court should reject Texas's attempt to prevent the voices of these *amici* from being heard in this case.

III. Response to Colorado

New Mexico agrees with Colorado that the United States should not be allowed to bring Compact claims in this proceeding. The United States is neither a party to the Compact nor a third-party beneficiary of the Compact. Its participation in this case is necessary to bind it to the decrees of this Court, but that does not give it the authority to bring Compact claims of its

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[3] While an *amicus* need not agree with its State party on all points, a political subdivision of a State may not directly contravene the State that represents it. *Amicus* EBID has crossed that line here. New Mexico does not dispute EBID's right to file its *amicus* brief, but the Court should disregard EBID's arguments. This Court has consistently found that a "state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all of its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930)). For this reason, the Court has not allowed States in original actions to be "judicially impeached on matters of policy by [their] own subjects." *Id.* The Special Master correctly observed that "EBID's intention to impeach its own State . . . is offensive to the notion of sovereign dignity and prohibited by the doctrine of *parens patriae*." Report at 227 (citing *New Jersey v. New York*, 345 U.S. at 373). The Court should not entertain the effort of EBID to express policy disagreements with its State by offering arguments in support of its State's opponent.

own. For the reasons Colorado and New Mexico articulated in their Replies, the Court should not permit the United States to bring claims under the Compact.

A. Colorado Is Correct That the Compact Does Not Grant the United States a Cause of Action

Colorado correctly argues that the Compact has no effect on the 1906 Convention. Colo. Reply at 3, 5 (citing Compact Arts. I(l), XVI). Colorado also points out that the Compact clearly separates treaty obligations and Compact allocations of water to the States. *Id.* at 4-5 (quoting Compact Art. XIV). The Compact therefore did not add Compact remedies to the remedies that pre-existed the Compact, under which the United States could address any alleged violations of the 1906 Convention.

Similarly, Colorado is correct in stating that the Compact did not provide to the United States any additional Compact remedies to protect the Project. *See id.* at 6-7 (citing Compact Arts. VI, VII and VIII to demonstrate the Compact focused on the protections and powers of the compacting States, not on the United States or on the Project). The Compact relied on the existing Project as a practical means for delivery of water, but it is an agreement among the compacting States alone. Specifically, New Mexico agrees with Colorado's summary of key provisions in the Compact as defining the relationships between the States, not defining United States' claims:

> [The Compact's] terms are designed to implement the apportionments among the States, not to create separately enforceable federal rights. For example, pursuant to Compact Article VI, a spill from Elephant Butte Reservoir erases debits accrued *by Colorado and New Mexico*. Compact Article VII triggers storage limitations *in Colorado and New Mexico* above Elephant Butte Reservoir when project storage falls below 400,000 acre feet, unless other conditions exist. Under Compact Article VIII, *Texas* may request release of some storage waters to bring Project storage up to a volume of 600,000 acre-feet by March first. These portions of the Compact define the *States'* upstream obligations, and relief therefrom, based on volumes of water stored in and released from the Project.

Id. at 6-7 (emphasis in original). Accordingly, the Compact did not, as the United States argues, add Compact remedies to the remedies that pre-existed the Compact under which the United States could address any alleged interference with the Project. *See id.* at 8-10 (demonstrating that none of the cases on which the United States relies support its novel theory that it may sue under a compact to protect federal interests independent of the compacting States).

B. Colorado Is Correct That the Compact, As a Contract Among States, Does Not Make the United States a Third-Party Beneficiary

Colorado's repudiation of the United States' claim that it is a third-party beneficiary of the Compact is well-founded. *Id.* at 10-13 (demonstrating that the United States has failed to show that the parties to the Compact intended directly to benefit the United States). The beneficiaries of the Compact are the compacting States. The beneficiaries of the Project are the water rights owners. The United States has avenues outside the Compact for the protection of federal interests.

CONCLUSION

To avoid future confusion in this case, and to avoid approving an erroneous interpretation of the Compact that would unnecessarily strip New Mexico of sovereignty over its water resources, the First Interim Report of the Special Master should not be adopted. Instead, the Court should deny the Motion to Dismiss Texas's Complaint, enter an order stating that any findings or conclusions specified in the Report are not the law of the case, and recommit the case to the Special Master for further proceedings.

Further, the Court should overrule the United States' exception to the Special Master's recommendation that the United States' Complaint should be dismissed to the extent it raises Compact claims.

Respectfully submitted,

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No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON THE EXCEPTION BY THE UNITED STATES TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

SUR-REPLY BRIEF FOR THE UNITED STATES

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ON THE EXCEPTION BY THE UNITED STATES TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

SUR-REPLY BRIEF FOR THE UNITED STATES

The States of New Mexico and Colorado have filed briefs opposing the United States' exception to the Special Master's recommendation that the United States' complaint in intervention should be dismissed to the extent that it asserts claims under the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785. New Mexico and Colorado contend that the United States cannot bring suit based on alleged violations of the Compact because it is not a signatory to the Compact (N.M. Reply Br. 6-11; Colo. Reply Br. 2-3); that any claims the United States has against New Mexico must instead be based on the Convention Between the United States and Mexico Providing For the Equitable Distribution of Waters of the Rio Grande For Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953, and other laws (N.M. Reply Br. 11-18; Colo. Reply

Br. 3-6); that the United States is not a third-party beneficiary of the Compact (N.M. Reply Br. 29-32; Colo. Reply Br. 10-13); and that the United States' intervention in this case could lead to a circumvention of state law and of a general adjudication of water rights in the lower Rio Grande currently pending before a New Mexico state court (N.M. Reply Br. 32-36).

Those contentions should be rejected. The United States intervened in this case to assert specific federal interests that are reflected in and protected by the Compact, as it has done in other interstate compact disputes. For the same reasons that the United States can enforce the statutory protections for federal interests provided in the Compact, the United States can also enforce the Compact under contract principles as a third-party beneficiary. The United States' request for relief against New Mexico seeks a ruling by this Court regarding New Mexico's obligations under the Compact, insofar as they affect the operation of the Rio Grande Project (Project) and the United States' obligations to deliver water from that Project, including to Texas and Mexico. Those Compact obligations are binding on New Mexico citizens and must be respected by the state water adjudication court.

A. The United States May Obtain Declaratory And Injunctive Relief Against New Mexico For Violations Of The Rio Grande Compact

1. New Mexico (Reply Br. 6-9) and Colorado (Reply Br. 2-3) contend that the Compact's status as a federal law as a result of Congress's approval pursuant to the Compact Clause, U.S. Const. Art. I, § 10, Cl. 3, does not mean that the United States can enforce the Compact against the signatory States. But the United States is

not claiming a broad right to intervene in every case involving an interstate compact. Nor does the United States contend, as New Mexico suggests (Reply Br. 9-11), that it may bring suit to enforce an interstate compact simply because a federal representative participated in compact negotiations. The United States' ability to seek declaratory and injunctive relief for New Mexico's violations of the Compact is based on specific federal interests protected by the Compact. See U.S. Exception Br. 34-40. Congressional ratification of the Compact, which expressly incorporates the federal reclamation Project, and the United States' participation in the Compact negotiations at the direction of Congress and for the purpose of representing the 1906 Treaty and the Project, see U.S. Exception Br. 12-13, reinforce the conclusion that the Compact protects specific federal interests.

New Mexico contends (Reply Br. 4) that the United States' request for declaratory and injunctive relief that would require New Mexico to comply with its Compact obligations "threatens to massively expand the United States' authority over interstate compacts." In New Mexico's view (Reply Br. 24), the United States, by intervening in this case, seeks to "claim for itself a central role in the administration and enforcement of the Compact." Those concerns are unfounded.

This Court's precedents make clear that intervention of the United States is warranted where "distinctively federal interests, best presented by the United States itself, are at stake" in an interstate dispute. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). The United States has set forth those federal interests in detail. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 4-9; U.S. Exception Br. 36-40. In short, the

United States has an interest in ensuring that the Compact is interpreted to require New Mexico to curtail diversions of surface water and hydrologically connected groundwater in New Mexico below Elephant Butte Reservoir to the extent those diversions interfere with Project deliveries that fulfill the United States' treaty obligation to Mexico and complete the Compact's apportionment to Texas and lower New Mexico. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 5-8. Such diversions would decrease water available to the Project and undermine the United States' calculation and delivery of contractual diversion allocations between the water districts in Texas and New Mexico. *Ibid.*; U.S. Exception Br. 10-12 (describing 1938 contract with irrigation districts in New Mexico and Texas providing for a 57%-43% split of Project deliveries based on irrigable acreage in each district and the 2008 Operating Agreement between the United States and the water districts).

New Mexico has recognized that the United States' interest in operating the Project pursuant to those contracts is directly implicated here. Indeed, New Mexico initially resisted the filing of Texas's complaint on the ground that participation by the United States was required to resolve the dispute. N.M. Br. in Opp. 31-34. It explained that "the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project," because "[t]he United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas." *Id.* at 33.

The United States also has an interest in ensuring that the Compact is not interpreted to allow New Mexico water users to intercept or interfere with the delivery of Project water to Mexico to fulfill the obligation of the United States to deliver 60,000 acre-feet of water per year to Mexico pursuant to Article I of the 1906 Treaty, 34 Stat. 2953. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 8-9. That is both because uncapped use of water by non-Project water users below Elephant Butte Reservoir could reduce Project efficiency to a point where the United States could not meet its delivery obligation, and because Article II of the 1906 Treaty links the quantity of water that the United States must deliver to Mexico during an extraordinary drought to the quantity of surface water delivered to irrigation districts in the United States. *Ibid.* (citing 1906 Treaty, Article II, 34 Stat. 2954).[1]

Those interests are properly protected by the United States in this suit, and the United States has carefully tailored the relief it seeks to the specific interests it has intervened to protect. It has asked the Court to declare

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[1] In previous suits brought by Texas to enforce the Rio Grande Compact, New Mexico and Colorado took the position that the United States was a required party in light of its treaty obligation to Mexico. In *Texas* v. *New Mexico*, No. 9, Orig., New Mexico argued that "[n]o decree may be entered determining or enforcing the rights of Texas or New Mexico arising out of the Rio Grande Compact without making a provision to assure the delivery of water to fulfill the obligations of the United States under the [1906 Treaty]." N.M. Answer at 16, *Texas* v. *New Mexico*, No. 9, Orig. (filed Aug. 23, 1952). Colorado made the same argument in *Texas* v. *Colorado*. See Colo. Answer at 5, *Texas* v. *Colorado*, No. 29, Orig. (filed Feb. 9, 1968). Those States thus have directly linked the declaration of rights and obligations under the Compact with protection of the federal treaty obligation.

that, as a party to the Compact, New Mexico (i) may not permit water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico; (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts; and (iii) must affirmatively act to prohibit or prevent such interception or interference. U.S. Compl. 5. The United States has requested injunctive relief to the same effect. *Ibid.* New Mexico's concern (Reply Br. 8, 24) that the United States is seeking a radical expansion of its power to enforce interstate compacts as a general matter is thus unfounded. New Mexico points to no instance in which the United States has sought to assert federal interests protected by an interstate compact other than as an intervenor in an already-pending dispute between States, and questions concerning such an action are not presented here.

2. New Mexico observes (Reply Br. 11) that the United States is "an express party and signatory" to other interstate compacts, and it suggests that the United States' non-signatory status to the Rio Grande Compact "confirms [that] the Compact was not intended to confer any rights or protections on the United States." That suggestion is incorrect. The compacts identified by New Mexico—the Delaware River Basin Compact, Act of September 27, 1961, Pub. L. No. 87-328, 75 Stat. 688, and the Susquehanna River Basin Compact, Act of December 24, 1970, Pub. L. No. 91-575, sec. 1, 84 Stat. 1509—are compacts that create regional agencies of federal and state representatives to "encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of [a] basin." Delaware River Basin

Compact, Art. 1, Sec. 1.3(e), 75 Stat. 690; Susquehanna River Basin Compact, Art. 1, Sec. 1.3(5), 84 Stat. 1512 (same). Those compacts are different from interstate compacts that apportion water of an interstate stream among States, and they do not shed any light on Congress's intent in approving the Rio Grande Compact decades earlier. See *Texas* v. *New Mexico*, 462 U.S. 554, 565 (1983) (congressional intent may be informed by "[o]ther interstate compacts, approved by Congress contemporaneously"). New Mexico identifies no interstate apportionment compact to which the United States is a party, and yet the United States has been permitted to intervene as a plaintiff in other compact cases to assert and protect federal interests that are implicated by those compact disputes. U.S. Exception Br. 38-42.

New Mexico contends (Reply Br. 21-22) that in *Texas* v. *New Mexico*, No. 65, Orig., the United States intervened "simply to protect other federal interests, not to assert a * * * cause of action arising from a compact." New Mexico bases that contention on the United States' prayer for relief in its complaint, which requested "such relief as is appropriate and necessary to protect the United States' rights with respect to the waters of the Pecos River stream system." U.S. Compl. in Intervention at 9, *Texas* v. *New Mexico*, No. 65, Orig. (filed Aug. 20, 1975). In the present controversy, the United States' request for relief is more specific as to how the Court can shape declaratory and injunctive relief to protect the United States' interests, but that does not make the request for relief inappropriate or suggest that the United States' claim for relief in the Pecos River dispute was not a request for the Court to enter relief based on the compact. The United States' request

for relief in the Pecos River case—relief "appropriate and necessary to protect [its] interests," including the protection of a treaty obligation to deliver water to Mexico, see U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10-11, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.)—could readily encompass a declaration that the States must comply with their compact obligations.

New Mexico further contends (Reply Br. 23-24) that in *Texas* v. *Colorado*, No. 29, Orig., the United States did not suggest that it sought relief under the Compact when it intervened as a plaintiff and requested "that its rights with respect to the waters of the Rio Grande stream system be fully recognized and protected by the Court." U.S. Compl. in Intervention at 5, *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968). To the contrary, the United States explained that it was intervening because it "recognize[d] that the Compact may be construed, reformed or held unenforceable * * * so as to affect federal interests adversely," U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 7, *Texas* v. *Colorado*, *supra* (No. 29, Orig.), and it set forth in the complaint its view that the United States' interests would "be protected by compliance with [the Compact's] terms," U.S. Compl. in Intervention ¶ VI, *Texas* v. *Colorado*, *supra* (No. 29, Orig.). The request for relief in that case clearly contemplated relief that would require the States to comply with their compact obligations.

New Mexico (Reply Br. 25-28) and Colorado (Reply Br. 8-9) also attempt to distinguish *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993), where the United States was granted summary judgment on claims to protect "its longstanding diversion and storage practices" and to es-

tablish the priority date for its reservoirs under an equitable apportionment decree that apportioned no water to the United States. *Id.* at 594; see U.S. Exception Br. 42-45. New Mexico argues that the Court's characterization of the United States' claims as raising "an enforcement issue," 507 U.S. at 592, does not mean that the United States "has free-roving authority to enforce apportionment decrees and interstate compacts as it sees fit." N.M. Reply Br. 26. The United States is not asserting or seeking such authority here. See pp. 2-6, *supra*. But *Nebraska* v. *Wyoming* remains an example relevant to this case. The Court there permitted the United States to protect federal interests in an action to enforce an equitable apportionment decree, even though the United States did not itself receive an apportionment of water under the decree, because the Bureau of Reclamation's (Reclamation) practice of storing water in its reservoirs was "necessary to ensure the delivery of the 46,000 acre-feet of water [to Nebraska] envisioned in the apportionment." 507 U.S. at 595.

3. The basis for the United States' intervention in this case—to protect federal interests that are threatened by New Mexico's violation of the Compact—is neither unusual nor an attempt to expand the United States' role in enforcing interstate compacts. New Mexico observes (Reply Br. 19-21), as did the Master (First Interim Report of the Special Master (Rep.) 220), that the United States often participates in original actions as amicus curiae. That observation has no bearing on the propriety of the United States' intervention in this case. In any original action, the United States evaluates how its interests are implicated in the dispute and decides whether to participate at all—and if so whether to participate as amicus curiae or to submit to the

Court's jurisdiction by seeking leave to intervene as a party. Consistent with New Mexico's assertion that the United States' interests are so squarely implicated here that the case could not proceed unless the United States intervened, N.M. Br. in Opp. 31-34, the United States concluded that the best course was to subject itself to the Court's jurisdiction by seeking leave to intervene, so as to permit a full resolution of the dispute. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 10. Identifying the federal government's interests that are at stake and requesting relief that protects those interests is precisely the role the United States should be expected to play in these circumstances.

B. The United States Is Not Limited To Seeking Declaratory And Injunctive Relief Against New Mexico Based Solely On The 1906 Treaty And Non-Compact Laws

1. New Mexico (Reply Br. 12-18) and Colorado (Reply Br. 4-6) contend that the United States' ability to protect its treaty and reclamation obligations at stake in this case can only be based on the general authority of the United States to seek relief in equity to protect its interest in treaty compliance or to prevent violations of reclamation law, and cannot be based on the Compact. The Court should reject that argument.

In its complaint, the United States did not draw a distinction between claims based upon the Compact and claims based upon other laws. That distinction is at issue now because the Master structured his Report in a way that differentiates between claims based on alleged violations of the Compact and claims under federal reclamation law. Rep. 229-237. As a result, the United States demonstrated in its brief in support of its exception that it may seek declaratory and injunctive relief against New Mexico for violations of the Compact—a

federal law that protects distinct federal interests (i) in administering the Project that is the vehicle for accomplishing the Compact's equitable apportionment, and (ii) in complying with the United States' contract and treaty obligations. U.S. Exception Br. 34-40 (discussing *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), and *United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), appeal dismissed and cert. denied, 459 U.S. 801 (1982)). The Compact imposes obligations upon New Mexico that protect those federal interests, and it is thus appropriate for the United States to base its claims for injunctive relief on New Mexico's alleged violations of the Compact.

New Mexico contends (Reply Br. 13) that the United States' reliance on *Sanitary District of Chicago* is misplaced because the United States in that case sought to enjoin the defendant from taking water in violation of a federal permit, not an interstate compact. That distinction makes no difference. In *Sanitary District of Chicago*, the defendant's use of water in excess of the permit threatened navigability of a channel from Lake Michigan to the Des Plaines River and implicated treaty obligations of the United States. 266 U.S. at 423-425. The Court held that the United States could obtain relief enjoining the defendant from exceeding the authorized permit withdrawals in order to protect those federal interests, even if no federal statute specifically authorized the suit. *Id.* at 425-426. Here, the United States likewise needs no specific authorization to seek injunctive relief to prevent New Mexico from violating its obligations under the Compact—a federal statute that similarly protects federal interests, including treaty obligations.

New Mexico contends (Reply Br. 12, 18) that the United States "has always been able" to bring a claim based on the 1906 Treaty or reclamation law to protect its operation of the Project and its treaty and contract obligations. In New Mexico's view, the United States therefore need not rely on the Compact. And it implies (*id.* at 14) that the defendants to such an enforcement action—at least one based on interference with the United States' treaty obligation—would be the "water users * * * impairing [the] treaty obligation," rather than the State. That suggestion underscores why the Court should not rule out the United States' ability to seek declaratory and injunctive relief against New Mexico based on its violations of the Compact, which obligates the State to prevent its water users from interfering with Project deliveries that carry out the Compact's equitable apportionment. See U.S. Reply Br. 8-9; see also Rep. 200-201, 213.

2. Alternatively, New Mexico (Reply Br. 16-18) and Colorado (Reply Br. 6-7) dispute that the Compact is a federal statute that protects federal interests. According to New Mexico (Reply Br. 16-17), the Compact—and specifically Article IV, which requires New Mexico to deliver water to Elephant Butte Reservoir, 53 Stat. 788—is "silent regarding the United States' operations of the Project after delivery to Elephant Butte Reservoir." See N.M. Reply Br. 17 ("Article IV says nothing about Project operations, or specific uses of water below Elephant Butte."). That argument is incorrect.

As the United States has explained, the Compact protects the Project's operations. U.S. Exception Br. 33-40. In the Compact, the States (i) incorporated and relied upon an existing reclamation project to deliver

Texas's and part of New Mexico's equitable apportionment, Rep. 203-209; (ii) recognized that the Project also had an international treaty obligation to deliver water to Mexico, Compact, Art. XVI, 53 Stat. 792; (iii) agreed that New Mexico would deliver a specific quantity of water to the Project, *id.* Art. IV, 53 Stat. 788; and (iv) defined the water stored in the Project as "[u]sable [w]ater" that is "available for release in accordance with irrigation demands, including deliveries to Mexico," *id.* Art. I(k) and (*l*), 53 Stat. 786.

Thus, as the Master recognized, the Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200. Indeed, if the Compact did not prohibit New Mexico water users from interfering with Project deliveries, then "the question of Texas's equitable apportionment" under the Compact would be "an open, major source of controversy," contrary to the basic purpose of the Compact to "effect[] an equitable apportionment of" the waters of the Rio Grande above Fort Quitman, Texas. Rep. 202-203 (quoting Compact Preamble, 53 Stat. 785); see Rep. 203 (The Compact "unambiguously protect[s] the administration of the * * * Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments" of Rio Grande water.). Because the Compact protects the Project's operations, the United States can obtain declaratory and injunctive relief when those operations are threatened by Compact violations.

3. New Mexico's resistance (Reply Br. 24-25) to the United States' ability to seek relief based on the Com-

pact appears to be based on the idea, shared by Colorado (Exceptions Br. 8), that the United States should not be permitted to "tak[e] positions or assert[] theories at odds with the positions and claims of the actual compacting parties" when it intervenes in an interstate compact dispute. N.M. Reply Br. 25. That view is unsound. The United States has agreed to submit to this Court's jurisdiction and participate in this suit as a party, and in so doing it has agreed to be bound by the Court's interpretation of the Compact. The whole point of intervention is to protect the distinct federal interests at stake in this dispute over the scope of New Mexico's obligations under the Compact, and the United States must be permitted to request relief from the Court that protects those interests. The Compact incorporates and relies upon a reclamation project to carry out its equitable apportionment framework, and the United States is not required to remain silent while the States present arguments on how the United States should operate its Project.

C. The United States May Enforce The Compact As A Third-Party Beneficiary

For the same reasons that the United States has a right to enforce the statutory protections in the Compact, the United States has enforceable rights under principles of contract law as a third-party beneficiary. U.S. Exception Br. 46-48. New Mexico (Reply Br. 29-32) and Colorado (Reply Br. 10-13) dispute that the United States is a third-party beneficiary with interests protected by the Compact. They contend (N.M. Reply Br. 29-31; Colo. Reply Br. 11-12) that the purpose of the Compact is to benefit the States, not the United States. But the fact that Texas benefits from New Mexico's

promise to deliver water to the Project under the Compact does not mean that the United States' interests in the Project and its ability to fulfill its obligation to make deliveries of water to Mexico, Texas, and lower New Mexico are not also protected by the Compact.

New Mexico (Reply Br. 29-31) and Colorado (Reply Br. 12-13) further contend that the Compact does not reflect any express or implied intention of the States to benefit the United States. But for all the reasons the Compact is a federal law that protects the Project, see pp. 12-13, *supra*, the Compact reflects an intention to benefit the United States. See Restatement (Second) of Contracts § 302(1)(b) (1981) (intent to benefit a third party may be inferred from the circumstances). The Compact language, and specifically Article I(*l*)'s description of usable water that New Mexico delivers to the Project, reflects the parties' understanding that water delivered by New Mexico to Elephant Butte Reservoir will be available for release by Reclamation "in accordance with irrigation demands, including deliveries to Mexico." 53 Stat. 786. That language demonstrates that the parties intended to protect the Project's operations and its preexisting commitments, including the United States' treaty obligation.

Moreover, the "structure of the performance required under the [Compact]" provides further indicia of the States' intent to benefit the United States. See *Public Serv. Co. of N.H.* v. *Hudson Light & Power Dep't*, 938 F.2d 338, 342 (1st Cir. 1991) (emphasis omitted). The Compact requires New Mexico to perform its duties by delivering water to the Project, which is responsible for releasing water to fulfill Texas's equitable apportionment and the United States' treaty obligations. By requiring New Mexico to deliver water directly to

the Project, the structure of the Compact thus enables the United States to satisfy those obligations. New Mexico (Reply Br. 30) and Colorado (Reply Br. 11) contend that the Compact was meant only to "reflect the *status quo*" with respect to the Project and not to give the United States any additional benefits. But it is the embodiment of the "status quo" into a compact legally binding on the States that confers a benefit on the United States and protects its ability to carry out the Project's obligations. See p. 12, *supra*.

D. Intervention By The United States Is Not An Improper Attempt To Circumvent State Law

New Mexico contends (Reply Br. 32-36) that the United States' request for declaratory and injunctive relief based on the Compact signifies that the United States is attempting "to circumvent New Mexico law" and the rulings of a New Mexico state court that is presiding over a general adjudication of Rio Grande water rights between Elephant Butte Reservoir and the New Mexico-Texas state line. See U.S. Exception Br. 17-20 (describing state water adjudication). That contention should be rejected.

As the United States explained in its reply brief to the exceptions filed by New Mexico and Colorado, the rulings of the New Mexico state court, which has held that it does not have jurisdiction to adjudicate a specific quantity of water for delivery to Texas as part of the Project's water right and has not recognized the Project's right to deliver water to Mexico, see U.S. Reply Br. 11, highlight the need for this Court to protect Texas's equitable apportionment under the Compact and the protection under the Compact for the United States' treaty obligation. Once those issues are determined in these proceedings, the New Mexico state court

must respect those rulings as it adjudicates water rights in the New Mexico portion of the Rio Grande Basin. See Rep. 216. New Mexico cites (Reply Br. 33, 37) *California* v. *United States*, 438 U.S. 645 (1978), for the proposition that the United States' water rights are properly determined under state law. But the Court made clear in that case that Section 8 of the Reclamation Act, Act of June 17, 1902, ch. 1093, 32 Stat. 390, does not override other specific directives of Congress. See *California* v. *United States*, 438 U.S. at 668 n.21, 672 n.25, 670-679. Although the Project's water right in New Mexico is governed by state law as a general matter, the Compact is a federal law that has independent legal force and would override any state law regulating or allowing the diversion or distribution of water that conflicts with the Compact's equitable apportionment.

By resolving questions of compact interpretation in this original action, this Court would not "step into the [state water adjudication] court's role," as New Mexico contends (Reply Br. 35), nor determine the relationship between the Project's water right and those of New Mexico citizens under New Mexico law. The role of this Court is to define the protections for the apportionment of water for Texas and lower New Mexico and the United States' treaty obligations provided under the Compact. Those rulings will then set certain federal parameters for the New Mexico water adjudication. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (an apportionment of water in an interstate compact is "binding upon the citizens of each State and all water claimants").

* * * * *

For the foregoing reasons and those stated in the brief of the United States in support of its exception, the exception of the United States should be sustained.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

SEPTEMBER 2017

IN THE SUPREME COURT OF THE UNITED STATES

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON EXCEPTIONS TO THE REPORT
OF THE SPECIAL MASTER

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that oral argument be allocated among the parties as set forth below. We are authorized to represent that all parties agree to the allocation of time requested in this motion.

1. This is an original action brought by the State of Texas against the State of New Mexico and Colorado seeking to enforce its rights under the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the waters of the Rio Grande Basin among the States of Colorado, New

Mexico, and Texas. Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that flows into Texas. Elephant Butte Reservoir is part of the Rio Grande Project (Project), a federal Bureau of Reclamation project that was authorized and constructed before the States entered into the Compact.

On January 27, 2014, the Court granted Texas leave to file its complaint and invited New Mexico to file a motion to dismiss, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). The United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention. The United States moved to intervene based on its claimed interest in protecting the operation of the Rio Grande Project operated by the Bureau of Reclamation and its treaty obligation to deliver water from the Rio Grande to Mexico. See Convention Between the United States and Mexico Providing For the Equitable Distribution of the Waters of the Rio Grande For Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff.

New Mexico moved to dismiss the complaints filed by Texas and the United States. In the First Interim Report of the Special Master (Report), Special Master A. Gregory Grimsal has recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. As for the United States' complaint in intervention, the Master has recommended that the Court grant New Mexico's motion to dismiss to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law.

2. The United States, New Mexico, and Colorado filed exceptions to the Master's Report. On October 10, 2017, the Court denied New Mexico's motion to dismiss Texas's complaint. The Court further ordered that the exception of the United States and the first exception of Colorado would be set for argument in due course. The United States took exception to the Master's recommendation that the United States complaint in intervention should be dismissed to the extent that it asserts claims under the Compact. U.S. Exception. Colorado's first exception contends that the Court should limit the claims of the United States to those based on the 1906 Convention with Mexico. Colo. Exceptions Br. 3-9.

In its reply brief, Texas supported the claims asserted by the United States to the extent they are Compact claims related

to the equitable apportionment set forth in the Compact. Tex. Reply Br. 39-40. In addition, as a sovereign State that is a party to the Compact, and as the party that has sought to enforce its rights under the Compact, Texas has a significant interest in the interpretation of the Compact and in the exceptions. For those reasons, we respectfully suggest that the Court would find it helpful to hear oral argument on behalf of both the United States and Texas. We suggest that the United States be allocated 20 minutes of argument time and that Texas be allocated 10 minutes of argument time.

In their reply briefs, Colorado and New Mexico opposed the United States' exception. Colo. Reply Br. 3-13; N.M. Reply Br. 2-32. In addition, New Mexico stated that it did not oppose Colorado's first exception. N.M. Reply Br. 1. As sovereign States that are parties to the Compact, and as parties that seek to protect their rights under the Compact, both States have a significant interest in the Compact and the Court's resolution of the United States' exception. Because the Court has ordered that oral argument be held on Colorado's first exception, we suggest that Colorado be allocated 20 minutes of argument time and that New Mexico be allocated 10 minutes of argument time.

Furthermore, because some of Colorado's argument time and much or all of New Mexico's argument time will be spent responding to the United States' exception, and because

Colorado's first exception also relates to the scope of the United States' participation in this case, Colo. Exceptions Br. 5-9, the parties agree that the United States and Texas should present argument before Colorado and New Mexico.

For those reasons, the parties propose to divide argument time as follows, with argument to be presented in the following order:

United States:	20 minutes (to include rebuttal time)
Texas:	10 minutes
Colorado:	20 minutes
New Mexico:	10 minutes

The parties believe that dividing the oral argument time as set forth above will facilitate an adequate and orderly presentation on the exceptions for which the Court has ordered argument.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

NOVEMBER 2017

No. 141, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **MOTION FOR DIVIDED ARGUMENT,** via email and first-class mail, postage prepaid, this 17th day of November, 2017.

[See Attached Service List]

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November 17, 2017

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisory Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

22-0141
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